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By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

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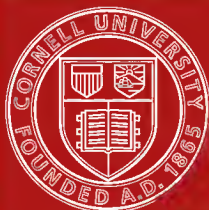
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REPORTS OF CASES
IN
THE PROBATE COURT
OF THE
CITY AND COUNTY OF SAN FRANCISCO.

REPORTS OF CASES
IN THE
San Francisco
PROBATE COURT

OF THE
CITY AND COUNTY OF SAN FRANCISCO,

From January 1, 1872, to December 31, 1879.

MILTON H. MYRICK,
Probate Judge.

EDITED BY
T. H. REARDEN,
OF THE SAN FRANCISCO BAR.

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By M. H. MYRICK.

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DEDICATION.

I take the liberty of dedicating this volume to my personal friends, Judges

MAURICE C. BLAKE, AND
SELDEN S. WRIGHT,

Who were my predecessors in office, and to whose professional learning and personal and official character is largely due the development of probate practice in this State.

M. H. MYRICK.

JUNE, 1880.

PREFATORY.

By the Constitution of this State as originally adopted, the County Judge in each county of the State was authorized to perform the duties of Surrogate, or Probate Judge. Under that provision of the Constitution, the Legislature from time to time enacted laws prescribing the duties of the Probate Judge and determining the powers of the Court; and the County Judges of the various counties have held Probate Courts and performed duties as Probate Judges. The same general system prevailed, with the single exception of the City and County of San Francisco, until December 31, 1879, on which day the old Constitution, with its amendments, was superseded by the new Constitution, and all the business of the former Courts passed to the Courts constituted by that instrument.

The Probate Court of the City and County of San Francisco, as a distinctive tribunal, and with a Judge of its own, came into existence by virtue of the constitutional amendments proposed in 1861, ratified September 3, 1862 (Art. VI, Sec. 1, old Constitution), and the Act of the Legislature approved April 20, 1863 (Stat. of Cal., 1863, p. 338, *et seq.*), the County Judge thereupon losing jurisdiction of probate proceedings.

The first Probate Judge elected was the Hon. Maurice C. Blake (afterwards the Judge of the Municipal Criminal Court). Judge Blake presided over the Probate Court for the first term (four years), from January 1, 1864, to December 31, 1868. He was succeeded by the Hon. Selden S. Wright, who held the office for the term of from January 1, 1868, to December 31, 1871. Judge Wright subsequently held the office of County Judge for four years, ending December 31, 1879.

From January 1, 1872, to December 31, 1879, two terms, the writer presided over the Probate Court, and was thereby permitted to devote eight years of professional life to labor in one of the most satisfactory, if not always the most exciting, departments of civil jurisprudence. His predecessors are too well known to the Bar and citizens to require any tribute here to their sound judicial tendencies or to the geniality of their dispositions; but he may be permitted to say that it was owing in great part to their many professional good qualities that the Probate Court became a tribunal as well compact and uniform in its rulings as traditional in the cultivation of courtesy and good-feeling between the Bench and the Bar, which reputation and character, it was ever the writer's pride to endeavor to maintain.

The jurisdiction of Probate Courts in this State was much more extensive than in many other States. It had exclusive jurisdiction of the probate of wills, the administration of all estates, as well of testates as of intestates, and of real as well as personal property; the appointment of guardians for infants and persons of unsound minds, and the management of the property of such infants and persons. In addition to which, the Judge divided with the County Judge the examination of persons supposed to be insane.

The volume of business flowing through the Court naturally grew with the growth and wealth of the city. Its importance may well be conceded when it is considered that the average period which elapses from the time that a parcel of real estate once passes through the Court as part of a succession, until it again requires administration, is ten years; that in California (a peculiarity of law not obtaining in other States) all realty becomes assets in the hands of the administrator, to be marshalled by the Court for distribution, and that every such adjudication is a careful ascertainment and expunging of all claims and obligations of decedent, a matter that, by reason of its *ex parte* nature, requires the greatest personal care and attention from the Judge, with a constant fear that some covert error may slip into ambush during the proceeding, to emerge, perhaps, when Judge and

counsel have passed away, clouding titles and impairing values of real property.

The writer claims little for the present volume, save that it may often suggest a convenient *nisi prius* rule, to serve until the higher tribunal has given a more authoritative decision.

The conservative practitioner in the Probate Court is, necessarily, of timid professional instincts. He dreads a contest, in that it endangers the complete integrity of the estate, the care of which he has undertaken; and his conciliatory policy is to arrive at speedy solutions, which he can anticipate at his own desk, and provide for and accommodate himself to with some degree of certainty. Hence the appeal of questions touching decedents' or minors' estates is not frequent; and what is sometimes termed judicial legislation has not, in this State, been as lavishly expended upon probate matters as the counsellor has often, perhaps, desired.

It is true, there have been severe and stormy contests in the Probate Court, which have brought out all the means of professional or oratorical display in the power of the advocate. But such battles have not generally been satisfactory, even to the successful parties, and, from the personal bitterness which almost invariably follows in the train of quarrels among relatives over estates left by the dead, have not always been pleasant for after contemplation by the Judge.

Some reminders of such strife are retained in the present volume in the shape of selected Charges to Juries. It is not often that courts of review pass upon instructions so given, except in a shreddy and piece-meal way; and it was therefore thought advisable, following in that regard the example of the learned Judges of the United States Circuit and District Courts (Sawyer's Reports), to furnish, as it were, a framework, whereby the practitioner might be guided in the instructions to be asked, and the trial Judge might find ready to his hand a synthesis of propositions, which he could enlarge, amend, or discard at his discretion.

No thought of the publication of any of the cases included in this volume was entertained until within the past

year. The volume has, therefore, been gathered together from loose notes of the Judge, reports appearing in print at the time of decision, and opinions on file. Many of the opinions consist only of the points decided, and it has been deemed more advisable to present such as they are, rather than attempt present elaboration. The collection has been made, too, in the midst of official duties demanding constant attention, and under circumstances which prevented the exercise of great care in revision.

The writer cannot send this little volume from his hands without expressing in some measure the great obligation he has been under, during his entire judicial career, to the Bar of San Francisco, and cannot give such expression more heartily than by quoting words used by him on retiring from the Probate Court:

“No man, upon any bench, can properly and faithfully perform the duties of his office unless he be aided by the members of the Bar with whom he is brought in contact. The members of the Bar of San Francisco have uniformly aided me in the performance of duties here; and whatever of success there has been, is in a great measure owing to your faithfulness and kindness. The conduct of the Bar has been uniformly kind, courteous, and considerate. We have here dealt much with widows and orphans—often with those who were destitute of means. I have never applied to any attorney to render gratuitous professional aid, but it has been freely and faithfully given.”

M. H. MYRICK.

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- Husband and wife. Separate estate. Real property owned by either before marriage, separate estate, notwithstanding community funds may have been expended thereon; such expenditure, however, may be ground for a claim in favor of community estate. Expenses of administration. Assessed *pro rata* upon community and separate estate. (C. C., 158-9, 162-3, 178-9. C. C. P., 624, 645, 1665) p. 241
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- Phinney, Arthur**, Estate of. Devise of property subject, at death of testator, to a mortgage bearing interest. Devisee entitled, under Sec. 1513, C. C. P., that the mortgage be paid out of moneys of the estate. (C. C. P., 1513) p. 239
- Plaisance, Ida**, Estate of. Executor. Incompetence of person named in will to take letters by reason of his immoral character. A man who "lives by his wits," not a proper person to be awarded executorship. (C. C. P., 1350) .. p. 117
- Post, Cornelia, Minor**, Estate and Guardianship of. Investment of funds. Guardian responsible for loss of funds only when he has deposited them in a bank known to be unsafe. Where guardian *loans* funds imprudently and without security, it is his duty to assume loss. (C. C., 2261) p. 230
- Radovich, Luco**, Estate of. Legacy. Demonstrative. When a special fund is set apart by will to pay demonstrative legacies, the Court will not endanger the means of their payment by directing payment, out of such fund, of a legacy that may ultimately be satisfied from another source. (C. C., 1357) p. 118
- Reck, Henry**, Estate of. Homestead. Property used in part for purposes other than a homestead, but included in declaration, cannot be set apart by decree. Executor not allowed commissions on homestead property, (C. C., 1263, C. C. P., 1618) p. 59
- Ricaud, J. P.**, Estate of. 1—Costs. A cost bill should be filed as in civil cases for costs paid to persons other than officers of the Court. On setting aside a homestead, appraisers, reporter, and interpreter should be paid out of estate; 2—Partial distribution. Community property. Widow entitled to apply for her share of community property, though her title is that of a survivor. In that connection, *heir* includes widow as survivor. (C. C. P., 1033, 1485, 1658) p. 158
- Rice, John D.**, Estate of. Jurisdiction. Recitals in decree of probate showing that jurisdictional notice has been given, where affidavits on file are defective but not antagonistic, can be attacked only by a showing that such recitals are untrue in point of fact, and further, that the Court has been imposed upon. (C. C. P., 2010-11) p. 183
- Robie, A. H.**, Estate of. Letters of administration. Persons entitled. Nominee of non-resident widow entitled, as against Public Administrator. (C. C. P., 1365-69) p. 226

- Rondel, E. F.**, Estate of. Homestead allotted by decree of Probate Court. Court thereafter loses jurisdiction; and cannot order sale to pay mortgage lien on the lot. The remedy must be by foreclosure in District Court. (C. C. P., 1465, 1486)p. 70
- Samuel, Michael J.**, Estate of. Jurisdiction. Residence inferred from acts of decedent. His conflicting assertions as to his intention. Where his election of residence was not sincere, but for a specious purpose, it must be disregarded. (Pol. C., 52. C. C. P., 1294).....p. 228
- Sbarboro, Giovanni**, Estate of. 1—Legitimacy. Conclusive presumption of, from uninterrupted intercourse of husband and wife. Adoption. Acts of a paramour in recognition of his paternity of the offspring of an adulterous wife, not deemed an adoption so as to entitle child to inherit from him;
2—Limitation of one year to revoke probate. When it expires. Petition handed to the Judge late in the evening of Dec. 2, 1879, to revoke probate of will admitted Dec. 2, 1878, and by the Judge delivered to the Clerk on the day following, with instruction to file it as of Dec. 2; Held, to be in time. The citation to executor need not issue forthwith; and the delivery to the Judge held to be sufficient filing. (C. C., 193-5, 230. C. C. P., 1327, 1333, 1707).....p. 255
- Schroeder, H.** Estate of. Order for sale of real estate. Grounds of opposition. The fact that there is a litigated claim held by estate against devisee, on which claim the debtor claims that there is nothing due, is no ground of opposition to granting order of sale. It is not necessary to abide determination of the litigation. Statute of Limitations. The allowance of a claim stays the running of statute. (C. C. P., 356, 363, 1540).....p. 7
- Secchi, Minors**, Estate and Guardianship of. Account. Moneys received by guardian here from a foreign source must be accounted for here, unless there is a positive showing that he has accounted for them in the foreign jurisdiction, the presumption being that the foreign court has permitted a transfer to the domicile of guardian and ward, to be administered here. (C. C. P., 1773-74)p. 225
- Selby Thomas H.**, Estate of. Claim. Interest, when allowable. The allowance of a claim by executor and Probate Judge does not make it a judgment in such sense as that it may draw interest. It is not a judgment in any sense until finally ordered paid. The true test as to interest on a claim is, whether or no, if decedent were alive, it would be interest bearing. (C. C., 1920. C. C. P., 1497, 1649).....p. 125
- Seligman, Louis**, Estate of. Unreasonable delay in closing estate; administrator chargeable with interest. (C. C., 2237).....p. 8
- Selna, Jr., Ubaldo**, Estate of. Devise. Succession. A future contingent interest vests in beneficiary so as to be subject of succession. Account of administrator cannot be settled until there is an inventory with appraisement on file. (C. C., 678, 680, 688, 690, 693-5-9, 1384).....p. 233
- Sime, John**, Estate of. Garnishment process served on executor. Before distribution, a garnishment, unavailing. (C. C. P., 717-18-19, 1666).....p. 100

- Stans, John H.**, Estate of. Community property. Insurance policy, the premiums being paid out of the earnings of husband, common property. Bequest of interest on \$4,000 by husband to wife, until she re-marries, is a claim on his *separate* estate, to be calculated from date of death until re-marriage. (C. C., 164, 1366)p. 5
- Stott, William**, Estate of. 1—Convict, under sentence of life imprisonment, civilly dead, so that his wife may be deemed a widow and entitled to take as legatee or devisee, where her widowhood is a condition of legacy or devise vesting;
 2—Interest. Compounded with annual rests, when executor is chargeable therewith for mingling estate's funds with his own;
 3—Attorney's fee disallowed executor, when incurred by him in his own behalf in litigating conflict with estate. (C. C. P., 1616. Pen. C., 674. C. C., 2236-7)p. 168
- Stow, J. W.**, Estate of. Grounds of revocation of letters. Law as to filing account, directory merely. If executors pay assessments on shares of stock, they do it at their peril. Creditors or heirs may support them in so doing, but the true course is to sell the stock as perishable. All these are matters to be heard on settlement of accounts, not grounds for revoking letters summarily. (C. C. P., 1522, 1628)p. 97
- Swiebert, Adam**, Estate of. Distribution. Before distribution, all claims by executor for his outlays must be paid. He cannot have distribution of estate and still keep it subject to his lien. (C. C. P., 1665)p. 152
- Taney, Patrick**, Estate of. Will. Signature. Name of proposed testator written by another person not a witness and not in presence of witnesses: Held, that testator should have called the attention of the witnesses to the fact that he had signed the document, and that it had been subscribed by him or by his authority. (C. C., 1276)p. 210
- Taylor, R. D.**, Estate of. Contempt, finding of; judgment of imprisonment of executor until he has paid over distributive shares of estate. (C. C. P., 1209, 1721)p. 160
- Titcomb, A. H.**, Estate of. Marriage. Facts showing an actual marriage, though unaccompanied by any ceremony. Homestead. Where widow occupies homestead of a value greater than \$5,000, she should, after return of inventory, pay rent for such excess. Claim against insolvent estate. Interest. Administratrix not allowed item, where she paid compound interest upon a claim against insolvent estate. (C. C., 55-57-68. C. C. P., 1474-86, 1494. Statutes 1861, p. 637.)p. 55
- Tittel, E. A. G. C.**, Estate and Guardianship of. Residence. Jurisdiction of petition for letters. Should be made in the county where proposed ward resides. (Pol. C., 52. C. C. P., 1294, 1747, 1763)p. 97
- Tittel, Frederica A.**, Estate of. Inofficious will. Mental incapacity. Restraint. Undue influence. Fraudulent misrepresentation. Delusion. Charge to Jury. (C. C. P., 1312, 1313, 1317)p. 12
- Tobin, Richard**, Estate of. The Boys' Roman Catholic Orphan Asylum at San Rafael, held to be a charitable society, and entitled to take a bequest. (C. C., 1275, 1313)p. 134

- Walsh, John**, Estate of. Revocation of letters of administration of Public Administrator on the grounds of failure to file inventory and to deposit funds in County Treasury as required by law. (C. C. P., 1729, 1737)p. 251
- Wardell, Ada**, Estate of. Will. Pretermission of illegitimate child. An illegitimate child inherits from her mother, if there be no mention of her in the will, as pretermitted offspring. (C. C., 1307, 1387)p. 224
- Webb, M. S.**, Estate of. Insurance policy. When premiums were paid by husband out of his earnings both before and after marriage, the proceeds, deemed part separate and part common property proportionally with premiums paid. (C. C., 163-4)p. 93
- Welch, John**, Estate of. Evidence. Witness. A creditor can testify as to decedent's indebtedness to him on hearing of application for letters. (C. C. P., 1365, 1378, 1880)p. 202
- White, J. B.**, Estate of. Will, conditional, to be valid in case of death on a particular voyage, a nullity on returning therefrom. (C. C., 1281)p. 157
- Whitmore, H. M.**, Estate of. 1—*Res Adjudicata*. Claim. Facts showing that there has been no adjudication upon: Allowance by one executor for contingent amount; before allowance by Judge, annual account filed, wherein the liability is stated as contingent; the account settled; another annual account silent as to claim, settled; a petition for sale of real estate granted, there being grounds for sale exclusive of claim and the question of claim reserved. Held, that the proceedings were no bar to an application by heirs to be heard in opposition to claim; 2—Contract to cut timber from Public Land, the title to which is in litigation with United States. Such contract held to be legal, and a claim thereunder allowable. Interpretation of certain clauses in contract. (U. S. Statutes, p. 1049, Sec. 5388. C. C. P., 1493, 1636, 1647, 1650, 1657)p. 103
- Winslow, Edward**, Estate of. Will. Signature of witness only partially executed, as where the first name or initial has been written; the last name not appearing to have been traced (either in ink or pencil), the execution of the will held to be imperfect; probate denied. (C. C., 1276)p. 124
- Winters, J. W.**, Estate of. Husband and wife. Dealings between man and woman as husband and wife, such relationship being actually impossible (there being an undissolved marriage of the man with another woman), cannot be held to constitute a partnership. First wife, entitled to half of community property. (C. C., 55, 155, 1402, 2395)p. 131
- Wright, Mary**, Estate of. Bequest to religious corporation void under Sec. 1275, Civil Code. (C. C., 1275)p. 213
- Wyche, Mary**, Estate of. Under the law in force (March, 1875), the Court has discretionary right to grant letters to nominee of grandmother of unmarried minor, in preference to creditor. (C. C. P., 1365, 1379)p. 85
- Yun, Yee**, Estate of. Letters of administration with will annexed. In cases of testacy, the selection of grantee of letters is within discretion of the Court. Public Administrator being a public officer, preferred to a Chinaman, who has no intention to permanently reside here, and who is ignorant of our laws and language. (C. C. P., 1350-51, 1379)p. 181

REPORTS OF CASES
IN
THE PROBATE COURT
OF THE
CITY AND COUNTY OF SAN FRANCISCO
FROM
JANUARY 1, 1872. TO DECEMBER 31, 1879.

ESTATE OF H. H. BYRNE.

No. 4645—1872.

UNDUE INFLUENCE—WILL DRAFTED BY BENEFICIARY.—The fact that the beneficiary drafted the proposed will, is, in itself, only a suspicious circumstance, which might prompt a closer scrutiny on the probate; but when the execution, in all other respects, is free from criticism, the mere drafting by the person to be benefited, can raise no presumption of undue influence.

WIDOW'S ALLOWANCE.—The right of a widow to have an allowance set over to her out of the estate, may very properly be tested by reference to her relations with deceased, and her right, as wife, to call on him for her maintenance during his lifetime.

A wife who has separated from her husband; re-married under the erroneous impression that she was divorced; had children by such second marriage; and never, at any time, had conjugal relations with decedent, cannot be said to be a member of his family, so as to entitle her to a family or widow's allowance.

Construing sections, C. C. 1272; C. C. P. 1312, 1466-8.

T. W. Freelon, for proponent.

Wm. Loewy, for heirs.

The deceased was a well known member of the Bar of

San Francisco, and had held responsible positions under the city government. The deceased and E. R. Carpentier (who was also an attorney), had been intimate friends for many years. During his last illness, deceased gave directions to Mr. Carpentier for the drafting of a will; and the will proposed was drawn by him accordingly. None but the two knew of its contents during the life of Mr. Byrne. After some small legacies, Mr. Carpentier was made residuary legatee, the estate being then supposed to be quite large. The witnesses to the will were both physicians, in attendance on the deceased, one was a life-long friend. They saw the will signed, and testified as to the soundness of mind of deceased.

By the COURT: If a beneficiary draft a will, it is of itself ground for suspicion, and the circumstances of its execution should have close scrutiny. In this case there is no evidence of undue influence. The deceased was in possession of his faculties, and made the will as he desired.

Will admitted to probate.

After the issuance of letters, a petition of Matilda Heron Byrne was filed, claiming to be the widow of deceased, and asking for a family allowance.

Hall McAllister, for petitioner.

A. Campbell, for Carpentier.

By the COURT: The petitioner and deceased intermarried in this city in 1853. There is no evidence of cohabitation. If there was any such act, it was followed by immediate separation; there has been no issue. Subsequently divorce proceedings were instituted; and petitioner was informed by her attorney that a decree of divorce had been granted. The information was incorrect; but she, believing it to be correct, intermarried (as she supposed) with one Stoepel. She was, during all the time, pursuing her profession as an actress in various cities of the United States. In March, 1869, she commenced in New York an action for divorce from Stoepel, alleging the issue of the marriage to be one child then living.

Stoepel and the petitioner lived together as husband and wife from 1857 to 1869. After the separation of Stoepel and petitioner, there was no cohabitation of herself and Byrne, nor residence together, nor public acknowledgment as husband and wife, nor assumption of marital rights, nor pecuniary aid furnished by him. She alleges, however, that there was restoration of friendly feeling between them.

Under this state of facts, it was argued and considered whether, as a matter of law, the petitioner was entitled to family allowance.

Sec. 122 of the Probate Act provides that the "Probate Court or Judge shall make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances," &c.

The right to an allowance is not a common law right; it is founded upon the statute alone. It is quite different from the right of the heir to inherit, or of the widow to her dower, or of the right of the wife to one-half of the community property. It is an allowance made to *the family*. Who are intended by the statute to be included in the family? In one sense, all persons living as one household are members of the family; which may thus embrace married children and their children, boarders, servants, and even visitors; yet it would hardly be supposed that all these would be entitled to an allowance. I think that the statute was intended to embrace those who were the *immediate* family of the deceased; those who were by law entitled, up to his death, to look to him for support and protection. This would include the wife, minor children, and, perhaps, in exceptional cases, helpless parents and other relatives. Yet any person, to be entitled to an allowance out of the estate, must have been in the receipt, or in law, entitled to demand, of deceased a maintenance before his death.

The next question is, was the petitioner, at and prior to the time of the death of deceased, entitled to demand to be maintained by him? Could she at any time after the alleged marriage with Stoepel, have left him and returned to Byrne and demanded and required maintenance? Would Byrne have been bound to receive

her into his own house or provide for her elsewhere? Was she, in fact, or was she entitled to be considered, a member of his family? That she was in fact, is not contended for; so we have to consider the latter point only. A husband is bound to maintain his wife so long as she remains in his house, no matter what may be her conduct; so, too, if he drive her away; or she be compelled to leave by reason of his cruelty, or if she separate from him in consequence of his adultery; so, if she go away without cause and be willing to return; so, if they separate by mutual consent; so, if she elope and be willing to return. But if she go away and cohabit with another, he will not be liable for her support, even though she be willing to return.

At the time petitioner was married to Stoepel, she believed that her relations with Byrne had been dissolved; she was so informed by her attorney, in whom she had confidence. This fact is addressed to the moral consideration only, and does not change the legal effect which her relations with Stoepel had upon her relations with Byrne. If she believed that she was free to marry Stoepel, it necessarily follows that she did not regard herself as being any longer a member of Byrne's family; of course it would be impossible to owe allegiance to two living husbands, and have two homes, between which choice might be made at will. By her marriage and cohabitation with Stoepel, Byrne was released from all further liability. She could not renew that liability by offering to return. It could be renewed only by his reception and acknowledgment of her, or by his voluntary assumption of the liability.

Chancellor Kent (2 Kent, 146-7) says: "The husband is bound to provide his wife with necessaries suitable to her condition and his situation in life; and if she contract debts for them during cohabitation, he is obliged to pay those debts. * * * If the husband abandon the wife, or they separate by consent, without provision for her maintenance, or if he send her away, he is liable for her necessaries, and he sends credit with her to that extent. It has been a question whether, if the wife elopes, and repents, and returns again, and her husband refuses to receive her, he is then

bound for her necessities. The opinion of Lord Ch. Raymond was that he would be liable, if he refused to receive her; and the same doctrine is declared in New York; but it does not apply where the wife had committed adultery."

She may have been sincere in believing herself not the wife of Byrne, yet if the marriage with him was undissolved, her relations with Stoepel were inconsistent therewith. By the death of Byrne she was not deprived of any means of support which she had theretofore enjoyed.

The petition is dismissed.

ESTATE OF GEORGE W. JOHNSON.

No. 4649 — 1872.

WILL, OLOGRAPHIC — SIGNATURE NEED NOT BE A SUBSCRIPTION.—A will commencing, "I, George W. Johnson do make, etc., this my last will," written throughout in the handwriting of the testator, but not signed at the foot, is sufficiently signed.

Construing sections, C. C., 1276-7; C. C. P., 1309.

H. K. Moore, for proponent.

The paper was entirely written by the deceased, and commenced thus: "I, George W. Johnson, do make, etc., this my last will and testament," etc. The paper was not subscribed at the foot, nor does the name appear except as above stated. On its face it appears to be otherwise a completed instrument.

By the COURT: The signature of the testator is not required to be placed at the foot of an olographic will. If it appear anywhere in the instrument it is sufficient.

Order admitting will to probate.

ESTATE OF JOHN H. STANS.

No. 3753 — 1872.

COMMUNITY PROPERTY — BEQUEST BY HUSBAND TO WIFE MUST BE SATISFIED OUT OF HUSBAND'S HALF.—Insurance policy, the premiums on which were paid out of the earnings of decedent, a married man, is part of common property of marriage; and the widow is entitled to one half thereof as survivor of the marriage.

BEQUEST TO WIFE TO BE SATISFIED OUT OF HUSBAND'S SEPARATE ESTATE.—Where the decedent bequeathed to his wife the interest accruing on \$4,000 until she should re-marry, she is entitled to be paid such interest from his death until such re-marriage, out of the estate, subject to his testamentary disposition.

Construing sections, C. C., 164, 1366.

J. M. Burnett, for petitioner.

Alonzo Webb, contra.

This is a petition of the late widow of deceased for partial distribution. The deceased, after his marriage, obtained an endowment life policy of insurance, the premiums on which were paid out of his salary. After his death the amount of policy was received. The will gave his widow the interest of \$4,000 until she should re-marry; which has occurred. She now claims that one-half of the insurance money belongs to her as survivor, and that the interest to her re-marriage is to accumulate and be paid out of the other funds of the estate.

HELD, the insurance money is community property, and she is entitled to one-half thereof as survivor, and that the interest is to come from other funds.

ESTATE OF JAMES DEVOE.

No. 3399 — 1872.

REVOCATION OF PROBATE — ATTORNEY APPOINTED BY THE COURT cannot waive minor's right to apply for revocation of the probate of a will.

Appearance by such attorney upon probate does not bind the minor in the premises.

Construing sections, C. C. P., 1307, 1333, 1718.

McAllisters & Bergin, for executor.

McCullough & Boyd, for guardian.

The testator left him surviving a wife, an infant son, and a son by a former wife. The elder son is executor. Upon the hearing of the probate of the will an attorney was appointed by the Court to represent the infant son. The wife and the attorney for the infant son filed a contest. The con-

test was withdrawn by stipulation, and the wife and the attorney consented that the will should be admitted; and the Court admitted the will. Within a year a general guardian was appointed for the infant, who filed a contest and a petition to revoke the probate. The elder son objected to the petition.

HELD, an attorney appointed by the Court cannot waive any right of his ward: the infant was not bound by the acts of the attorney. Objection overruled.

ESTATE OF H. SCHROEDER.

No. 1333 — 1872.

ORDER OF SALE OF REAL ESTATE — GROUNDS OF OPPOSITION.—It is no ground of opposition to the granting of an order of sale of real estate, that there is a litigated claim held by estate against the grantee of a devisee, on which claim, the debtor claims there is nothing due. It is not necessary to abide the determination of such litigation before granting the order of sale.

STATUTE OF LIMITATIONS.—The allowance of a claim stays the running of the prescription.

Construing sections C. C. P., 356, 363, 1540; affirmed, 46 Cal., 304.

F. G. Newlands, for petitioner.

J. A. Fletcher, contra.

Streitberger was in possession of real estate of the deceased, and the administrator brought ejectment alleging three thousand dollars due for rents; and Streitberger defended the action. On an application by the administrator for sale of real estate, Streitberger, grantee of a devisee interposed the objection that the personal estate had not been exhausted, viz: the claim against himself for the rents, but admitted that he claimed not to be indebted.

HELD, his objection to the sale is not valid.

In this case it was also decided that when a claim against the deceased has been allowed and approved, the statute of limitations does not apply, and the debt will be paid in due course, notwithstanding several years elapsed after the allowance.

ESTATE OF LOUIS SELIGMAN.

No. 3847—1872.

ADMINISTRATOR CHARGEABLE WITH INTEREST IN CASE OF UNREASONABLE DELAY IN KEEPING ESTATE OPEN.—Where administrator, after having collected funds of the estate which can be distributed, delays, for no good reason, to file his account and close estate, he may be held chargeable with interest.

Construing section, C. C., 2237.

J. Naphtaly, for the adm'r.

Bartlett & Pratt, for the contestant.

By the COURT: The contestant claims that the administrator should be charged with interest on the moneys in his hands from July 12, 1871, to this day. The moneys, amounting to \$12,625.86, were not on deposit at the death of decedent, but have been received from debts and on a draft. By law, the administrator had the right to keep the funds of the estate in his hands one year for the purposes of administration. Upon the close of the year it is the duty of the administrator to present his account and proceed at once to close the administration. Of course, heirs have the right to move to have the administration wound up; but independent of this right of the heirs, it is the duty of the administrator himself to take steps. It is not the policy of the law that an administrator should, for an indefinite period, retain money or other property. The period of one year is fixed by law, to the end that upon the expiration of that year the administration be closed. If money be retained longer than that period, it must be for some reason. In the absence of any other reason, the law will presume that it is for the benefit of him who keeps it. It is apparent that no man, practically, keeps money in his possession merely for the gratification of counting and re-counting it; it is for some benefit; and if for benefit to himself, he must pay for that benefit. It appears to me to be a healthy rule, that if an executor or administrator keeps money in his hands beyond the year, without cause, and without proceeding to wind up the estate, he should be charged with interest. In this estate, two months expired after the year before the account was filed,

during which time occurred the usual summer vacation, and by reason of the illness of the then Judge of this Court but little business was transacted. After the objections were filed the administrator was not at fault for the delay. I do not think that there has been such delay as should inflict a penalty upon the administrator.

ESTATE OF MATTHEW DELANY.

No. 2170 — May 31, 1872.

SALE OF REAL ESTATE BY EXECUTOR, WHO IS ALSO A DEVISEE THEREOF IN TRUST UNDER THE WILL.—A sale does not require to be reported to the court for confirmation, when made by such devisee.

GRANTEE UNDER SUCH SALE may apply to the court for distribution to him, directly, of his purchase property.

BENEFICIARIES ENTITLED TO RESIDUE under such devise in trust may apply to the court, at their option, to have such remainder distributed to them in kind or may take proceeds of a sale thereof.

Construing section, C. C. P., 1561; affirmed, 49 Cal., 76.

Finn & Whittemore.

McAllisters & Bergin and E. B. Mastick.

A will devising property to an executor in trust to sell and apply the proceeds, passes the title, subject to the power of the Probate Court to order sale for the purposes of administration. If the executor, as the owner of the legal title, but not as executor, sells and makes a deed of real estate, the legal title passes to the grantee, subject to the necessity for a sale for purposes of administration, and such sale does not require to be reported to and confirmed by the Probate Court. In such case, the grantee is entitled, upon distribution of the estate, to have the property so conveyed distributed to him.

Where real property is so devised in trust to sell and pay certain sums, the balance to be paid to certain persons, and sufficient be sold to pay those sums and the debts and expenses of administration, and real estate remains unsold, those persons entitled to the balance may elect to have the real estate so unsold distributed to them, instead of the proceeds.

ESTATE AND GUARDIANSHIP OF ELIZA FEGAN.

No. 4091—June 15, 1872.

GUARDIANSHIP OF INSANE WIFE.—The husband cannot be allowed the custody of the person of his insane wife, when it appears that his friendliness towards her is very questionable; and that his motives for seeking to obtain letters are those of self interest.

Construing section, C. C. P., 1763.

G. T. Marye, Jr., for Fegan.

Drake & Rix, for guardian.

On the 13th day of January, 1871, after due proceedings thereto had, F. D. Cottle was duly appointed by this Court guardian of the person and estate of said Eliza Fegan, and letters were duly issued. On the 19th day of June, 1871, the said F. D. Cottle having resigned his trust and his resignation having been accepted, this Court duly appointed Thomas F. Yeager guardian in place of Cottle, and letters were duly issued, which are still in force. January 3, 1872, J. B. Fegan filed his petition for the revocation of the said letters of guardianship. The guardian, T. F. Yeager, filed objections; and upon the issues made, the case came on for hearing, and was heard on various days from April 2 to May 7, 1872, and submitted. From the hearing of the case, it appears that in October, 1863, the said J. B. Fegan and Eliza Fegan (then Eliza Eldridge, widow) intermarried in the City and County of San Francisco. He was a melter of metals, and she an assistant in a milliner's store. They resided together in San Francisco until March, 1864. Their relations were unhappy, he having on some occasions used personal violence towards her. In March, 1864, he, being out of employment, went to Virginia City, Nevada, and obtained employment in mining; she continuing her service in the store and maintaining herself. They corresponded for a time, letters from him to her being shown of dates April 2, May 5, May 20, May 23, June 26, Dec. 9, 1864, and Feb. 10, 1865. The letters to June were such as a husband might write to his wife, but gave no indication of a desire to return or to have her with him. He remitted her some small sums

of money. The letters of December 9, 1864, and Feb. 10, 1865, were coarse, vulgar and brutal in the extreme. He accused her of infidelity, and applied to her epithets of the utmost vulgarity. It has never been within my experience to read or hear more vulgar or obscene language than is contained in these letters. They could have been dictated only by a heart abandoned of all refinement and sensibility. He tells her that he will never live with her again nor see her, nor will he support her. He says, "If ever you put your foot on the mountain, I am off to some other wild home in the mountains. So take care of yourself in this world, for we may never meet again." "You had better look out for a home for the future, for with me you can never spend your days, for I have no love for you."

Not long after the reception of these letters, the said Eliza Fegan became insane, and was placed by her sister, Mrs. Yeager, in the State Lunatic Asylum, where she remained about a year. She was then returned to San Francisco and taken care of and supported by her sister and Mr. Yeager, and has been ever since. J. B. Fegan continued to reside in Virginia City, and was successful in mining operations, and accumulated considerable wealth. He visited San Francisco every year at least once, and sometimes oftener, but did not inquire for, seek, or visit his wife, nor assist in her support. He says that he first heard in 1869 of her insanity; but then he made no effort to alleviate her condition. In 1871, her friends having heard that he had become wealthy, sent bills to him for medical attendance and support. These bills he at first repudiated, but afterwards offered smaller sums in settlement, which were accepted. He then in Dec., 1871, became impressed with the pretence that he had affection for his wife and could support her for less than she was being supported, and endeavored to communicate with her with a view to removal. The guardian, on her behalf, commenced an action in the Fifteenth District Court for divorce and division of the common property. This suit is still pending. The object of Mr. Fegan in this application to remove the guardian is too apparent to mislead. In his testimony he says, "I returned to San

Francisco in Dec., 1871, for the purpose of procuring a suitable person to take care of my wife. My desire was to remove her from the care of Mrs. Yeager, for the reason that I believed she was not properly cared for, and was making unusual and extortionate charges against me for her care and maintenance. I desired to provide her with a good and comfortable home, and believed I could do so for much less than Mrs. Yeager had been charging."

This asserted desire to care for his wife and provide for her a home, is all a pretence. His only desire, in my opinion, was, to obtain a revocation of the letters, to the end that he might control both sides of the divorce suit and make provision for his wife or not, as he pleased. There is not a word of truth in his pretended regard for her welfare. She has been well cared for by her relatives; and so long as he had no bills to pay, he gave himself no trouble about the matter, not even to inquire for or about her; but as soon as he began to realize the legal consequences of his marital relations, he endeavors to manifest a tender regard for her. The pretence is too shallow.

The case of the petitioner is alleviated only by the skill and faithfulness of the counsel in endeavoring to present the matter in the best possible light for his client.

The petition of J. B. Fegan for revocation of the letters of guardianship issued to Thos. F. Yeager, is denied.

ESTATE OF FREDERICA A. TITTEL.

No. 4681—1872.

WILL—CHARGE TO JURY on contest of probate.

INOFFICIOUS, WILL AB IRATA.

MENTAL INCAPACITY, RESTRAINT, UNDUE INFLUENCE, FRAUDULENT MISREPRESENTATION, DELUSION.

George & Loughborough and *McAllister & Bergin* for proponents.

W. Van Dyke, C. F. Grey and *E. D. Sawyer*, contra.

Deceased was about seventy-five years of age at the date

of the proposed will. She was offended with her sons, Frederick, Charles, August and William, for the opposition made by them to her claims in the administration and distribution of the estate of her husband, their father, who died intestate in 1864, leaving valuable property on Kearny street. By this will she gives all her property to her sons Ernst and Conrad, her daughter Mrs. Himmelman, and her granddaughters Mrs. Humburg and Mrs. Boehme; and she disinherits her four sons first above named, for the reasons, expressed in the will, that they had been undutiful to her, and had caused her expensive litigation, and that they were already sufficiently provided for. William was in Mexico during the litigation referred to, but was represented by his brother Frederick in opposition to his mother. Upon his return the matter had been adjusted; and William ratified, as was contended on the trial, all that his brother Fred. had done, thereby making himself as much a party to that proceeding as if he had been personally present. August and William are both dead, but their minor children were represented at the trial by a guardian *ad litem*. Eight days were occupied in the trial. The principal issues submitted to the jury were, whether the deceased was of sound and disposing mind, whether she executed the will without restraint, undue influence or fraudulent misrepresentation, and whether she was under a delusion as to the conduct of her sons, or any of them, who were disinherited.

The following is the charge to the jury upon the issues referred to:

1. As to sound and disposing mind:

A sound mind is one wholly free from delusion. Weak minds differ from strong minds only in the extent and power of their faculties; unless they betray symptoms of delusion, their soundness cannot be questioned. It is not the *strength* of a mind which determines its freedom from delusion; it is its *soundness*. Thus, it is often said that such or such a distinguished man has a sound mind; yet a man in the plainer walks of life, of faculties of less extent or power, may be equally sound. The latter is of sound mind equally with the former if free from delusions. Delusion of mind is to

an extent insanity. The main character of insanity, in a legal view, is said to be the existence of a delusion: that is, that a person should pertinaciously believe something to exist which does not exist, and that he should act upon that belief. Belief of things which are entirely without foundation in fact and which no sane person would believe, is insane delusion; that is, when a person believes things to exist only, or at least, in that degree only, in his own imagination, and of the non-existence of which, neither argument nor proof can convince him—that person is of unsound mind. If he be under a delusion, though there be but partial insanity, yet if it be in relation to the act in question, it will defeat a will which is the direct offspring of that partial insanity. Thus, in one case where the testator conceived the groundless delusion that his nephew had conspired to effect his death, the will was set aside. On the other hand, in *Clapp v. Fullerton*, 34 N. Y., 190, it was held that the will could not be rejected on the ground that the testator entertained the idea that one of his daughters was illegitimate, if this belief was not founded on insane delusion, but upon slight and insufficient evidence acting upon a jealous and suspicious mind. Belief based on evidence, however slight, is not delusion. One person from extreme caution or from a naturally doubtful frame of mind, will require proof before acting, amounting, perhaps, to demonstration; while another, of different faculties but of equally sound mind, will act upon very slight evidence. Delusion rests upon *no* evidence whatever; it is based on mere surmise.

To apply these general principles to the case in hand: If Mrs. Tittel believed that her sons—Frederick, August, Charles, and William—had evinced toward her an unfriendly or unfilial spirit, or that they had caused her unnecessary litigation, and if that belief was entirely without foundation in fact; if the belief was the product of her own imagination, and if the script proposed as her will was made under such belief, and if she was influenced and controlled by such belief in making it, then she was not of sound mind, but was under a delusion, and the script so far is not her will. On the contrary, if she believed that her said sons had evinced

toward her an unfriendly or unfilial spirit, or had caused her unnecessary litigation, and any fact existed as a foundation for that belief, she was not laboring under delusion and the script is her will, however much she might have been mistaken in the conclusions at which she arrived. Therefore you will ask yourselves, did Frederick, August, Charles and William evince toward her an unfriendly spirit? Did they evince toward her an unfilial spirit? Were the proceedings formerly had in this Court regarding her removal as administratrix, instituted or countenanced by them? Were those proceedings of an unfriendly or unfilial character? Did they cause her unnecessary litigation? Did any fact exist which could cause a sane mind to believe that such was the case? If you answer *yea* to either of these questions, she was not laboring under a delusion regarding the same. If you shall answer *no* to all of these questions, but shall find that any fact existed and was known to her upon which she could base an opinion that her sons had thus acted, she was not laboring under a delusion respecting the same. A person may act upon weak testimony, yet be under no delusion. If you answer *no* to each of the questions above suggested, and shall find that no fact existed upon which a sane mind would form such opinion as is expressed in the script, then she was under delusion.

It may be true that she was laboring under delusion as to some of her said sons, and not as to others. That is, it may be true that Frederick, Charles or August did evince an unfriendly or unfilial spirit toward her, or did cause her unnecessary litigation, and that William did neither; or it may be that August and William, or Charles and August, or Frederick and William were thus unkind, and the other was not. If so, she may have been under delusion as to one or two, and not as to the other or others. It does not necessarily follow that there was delusion as to all because there was delusion as to some. If there was delusion as to some and not as to others, you will so state and specify in your verdict.

It may be added that it may be that there was delusion as to the acts of her said sons, and yet the script stand as a

will. She gives as a reason for disinheriting them and their offspring, not only the acts enumerated, but also because she deemed them already sufficiently provided for. Did the delusion also extend to that? Had they been, or were they already provided for? It is not for you to say whether the provision was sufficient—the sufficiency was for her to determine. She had as much right to judge that \$1,000 was a sufficient provision as that \$10,000 was required. Was she under a delusion in believing that her said sons or either of them had been provided for? If they, or either of them, had *not* been at all provided for, she was under delusion respecting the same.

2. Was she under restraint?

That is, did she execute the instrument by physical compulsion, or by fear or coercion? Was she so surrounded by those who desire to sustain this will, as that she could not and did not express her own wishes, and exercise her own judgment? Restraint refers to physical restraint, rather than mental influence.

3. Was she under undue influence?

A will produced by undue influence cannot stand. Undue influence is any kind of influence, either through fear, coercion or importunity, by which the testator is prevented from expressing his true mind. A question of this kind is not likely to arise, except in regard to persons of naturally weak mind or facile disposition, or where such has become their condition either from age or disease. It must, of course, be an influence adequate to control the free agency of a testator. It is very properly said: "A testator should enjoy full liberty and freedom in making his will, and possess the power to withstand all contradiction and control. That degree, therefore, of importunity or undue influence which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act, is sufficient to invalidate it." I have a legal right to ask of a person making his will, that he direct his property to go in any given channel; I may even urge and importune him; and if he have strength of mind sufficient to determine for himself, the will is good, even though he adopt

my suggestions; but if I ask or importune a weak mind, one exhausted by disease or otherwise, to such an extent that he do not have sufficient strength of mind to determine for himself, so that the proposed script expresses *my* views and wishes rather than his own, it is not his will. If the testatrix had sufficient memory and intelligence to fairly and rationally comprehend the effect of what she was doing, to appreciate her relations to the natural objects of her bounty, and understand the character and effect of the provisions of the will; if she had a reasonable understanding of the nature of the property she wished to dispose of, and of the persons to whom, and the manner in which she wished to distribute it, and did so express herself, it is good. It is not necessary that she should have acted without prompting. Importunity or influence to have the effect of invalidating a will, must be in such a degree as to take away her free agency.

You will apply these principles to this controversy, and in doing so, ask yourselves such questions as these:

Had Mrs. Tittel, at the time the script was executed, sufficient memory and intelligence to fairly and rationally comprehend the effect of what she was doing? Did she understand and appreciate her relations to her children and grandchildren, and did she understand the character and effect of the provisions of the will? Did she have a reasonable understanding of the nature of the property to be disposed of and of the persons to whom she wished to distribute it? Did she exercise her own choice, and did she express her own wishes? If she did have such understanding, she had the legal right to make any disposition of her property that she pleased. If she acted freely and with proper understanding, she had a legal right to disinherit every child and send her property to strangers. Neither courts nor juries can say whether this legacy or that is a prudent or wise one to make; by attempting to do so, we should attempt to make *our* will take the place of that of the testator. It is your province in this case, gentlemen, and in regard to the point now under consideration, only to say whether, under the principles above given you, this script was executed under undue influence.

4. As to fraudulent misrepresentation. In order that the will should have been executed under fraudulent misrepresentation, it is not necessary to consider the question of delusion or insanity. A person may be of perfectly sound mind, and yet be influenced by fraudulent misrepresentations. You will therefore inquire, whether the will contains any provision which was not communicated to her, or which was wrongly read to her, or which she was induced to believe was different from what appears in it; or whether false and fraudulent representations were made to her for the purpose of inducing her, and did induce her, to disinherit any one; whether any person interested in sustaining the will, falsely and fraudulently represented to her and caused her to believe that Frederick, Charles, August or William had evinced an unfriendly or unfilial spirit toward her, or had caused her litigation, to such an extent that she was governed and controlled by such false and fraudulent misrepresentations. If said sons named had committed those acts, it was neither false nor fraudulent for any person to say so to her. But if they had not so acted, it was false to say so to her, and it was fraudulent if said with the purpose of inducing her to disinherit said sons, in case it had that effect.

Misapprehension alone will not avoid a will. To have that effect, it must have been caused by fraudulent misrepresentations.

GUARDIANSHIP OF AUSTERHAUDT MINORS.

No. 3705—Oct. 1, 1872.

GUARDIANSHIP AND CUSTODY OF MINOR GIRLS.—CONTEST BETWEEN FATHER AND MOTHER WHO HAVE BEEN DIVORCED.

Where it appears that the mother is a proper person to have the custody of minor girls and where no good reason appears why such custody should be awarded to the father, whose competency appears doubtful, letters will issue to the mother.

Construing sections, C. C., 197-8, 246; C. C. P., 1751.

G. W. Tyler, for the father.

C. G. Howard and Daingerfield & Olney, for the mother.

The father and mother intermarried in this city about twelve years ago, and lived together until about two and a half years ago. The children, two beautiful and interesting girls, are aged respectively eleven and nine years. In January, 1870, the mother obtained a divorce from her husband on the ground of adultery. The mother retained the care and custody of the girls; she was very poor, but managed by hard work to support them and bring them up properly. A few months ago she married one Kerchival, and with the children went to live with him in Oakland. The father filed his petition in this Court, setting forth that the mother had instructed the children to assume her maiden name instead of retaining his, and had taught them to fear him and avoid him, and that she was alienating their affections from him, and was not a proper person to have the care of them; and prayed that he be appointed guardian.

After the divorce, the father and mother agreed that she should not apply for guardianship, but should retain the children and have the care of them, and that he should pay \$50 per month towards their support. He kept the promise for two months, but then marrying again, did not visit them or aid in their support. The children, on being questioned by the Court in presence of counsel, expressed a decided preference for the mother.

By the COURT: The mother is shown to be a good and proper person to have the care of the children; they earnestly desire to remain with her. On the other hand, the character of the father is at least questionable, in view of the proceedings in the divorce case; and the character of his second wife is seriously attacked. The petition of the father is denied, and the children may go with the mother.

ESTATE OF DAVID C. BRODERICK.

No. 1079—Oct. 9, 1872.

REVOCATION OF PROBATE. -- NON-RESIDENT ALIEN HAS, AFTER TEN (AND POSSIBLY FIVE) YEARS NO INTEREST IN ESTATE ENTITLING HIM TO ASK FOR REVOCATION OF PROBATE OF WILL.—UNDER THE CLAUSE MAKING PROBATE CONCLUSIVE AFTER ONE YEAR, SAVE AS TO PERSONS LABORING UNDER DISABILITY, COVERTURE IS NOT A DISABILITY.

Decedent died Sept. 16, 1859. Will admitted to probate Oct. 16, 1860. Petition by non-resident aliens filed, April 29, 1871, for revocation, on the ground that will is a forgery, and alleging that one of petitioners had theretofore suffered under disability of coverture.

HELD, that Statute of April 19, 1856, relating to escheated estates (Statutes 1856, p. 137) bars all interest in the estate, whereon a right to contest will could be based; and that married women labor under no disability in view of the right to sue and be sued without joinder of husband or next friend.

Construing sections, C. C. 672; C. C. P., 1269-1272, 1327, 1333; statutes 1856, p. 137.

W. W. Chipman and M. G. Cobb, for petitioners.

S. M. Wilson, D. D. Colton & R. C. Harrison, for executor.

By the COURT: This is a petition by Ann Wilson and Ellen Lynch for revocation of the probate of the will of deceased. The petition was filed April 29, 1871.

The petitioners allege that they are daughters of the only sister of deceased's father; that at the time of the death of deceased, said Ellen was a married woman and a resident of Sydney, New South Wales, at which place she resided until about June, 1870, and that for about ten months prior to filing said petition she was a resident of this city, and was then a widow; that at the death of said deceased said Ann was a married woman residing in the colony of Queensland, Australia, where she has ever since resided, and never was in this State, and that her husband died June 4, 1870. Both petitioners were foreign born. The petitioners allege the pretended will of deceased to be a forgery; that neither of them ever heard of the death of deceased until about February, 1868, and never heard of the forgery nor of the probate proceedings until within three years next before the filing of the petition, to wit, about May, 1869.

The following facts appear of record:

Deceased died September 16, 1859; October 16, 1860, the will was admitted to probate. The inventory was filed September 24, 1861, real estate valued at \$235,850, and personal property at \$7,046.79; debts have been allowed and approved, many thousands of dollars in excess of the personal property, and real estate has been sold to pay the excess.

The executor, John A. McGlynn, moves to dismiss the petition upon two grounds, viz:

1. The petitioners were non-resident aliens at the death of deceased and for more than ten years thereafter, and the petition was not filed until more than ten years after his death; and whatever rights they might have had are barred by the statute of April 19, 1856, relative to escheated estates. (Stat. 1856, p. 137.)

2. Sec. 30 of the Probate Act gives one year after probate of a will within which to contest, and Sec. 36 makes that year a bar.

As to the first point: The personal property was absorbed for the payment of debts. Aliens, non-resident, have no inheritance of real estate except as given by the Act of April 19, 1856, which provides "that no non-resident foreigner or foreigners shall hold or enjoy any real estate situated within the limits of the State of California five years after the time such non-resident foreigner or foreigners shall inherit the same;" and provides that if they do not appear within said five years, the property shall be sold, the proceeds deposited with the State Treasurer, and if not called for within other five years, such estate or proceeds shall be the property of the State and go to the school fund. Under this statute the petitioners had no interest in the estate of deceased after Sept. 16, 1869, ten years after his death; and it may be seriously doubted if they had any remedy in this Court after Sept. 16, 1864, five years after the death. Having no interest in the estate, they cannot question the validity of the will.

This case is not one where a foreigner is entitled to take and hold until office found. That principle applies only to a resident foreigner taking by *purchase*. At common law, a resident alien was permitted to take by purchase, and hold until office found; but he could not take by inheritance even for a day; he had no inheritable blood; he could not, even, be a conduit to a citizen. Our Constitution has removed that disability as to resident foreigners; but as to non-resident foreigners, the law is as before, except as modified by the act of 1856. At common law, a devise to a non-resident alien was void; neither could he inherit. Under the act of 1856, he may take, *provided*; the act gives a right where none before existed, and the proviso is a part of it; a person, to

have the benefit of such an act, must show himself within all its provisions. The petitioners had no interest in the real estate of the deceased, *as* real estate, after five years from his death; the five years was a limitation; and unless they claimed the real estate within five years, their right to ~~claim~~ was lost; they being then limited to claim the proceeds.

As to the second point: Sec. 36 of the Probate Act provides, "If no person shall, within one year after the probate, contest the same, or the validity of the will, the probate of the will shall be conclusive; saving to infants, married women and persons of unsound mind a like period of one year after their respective disabilities are removed." From the petition it does not appear when the husband of the petitioner Ellen Lynch died; whether one year or five years before the petition was filed. But from the view I take of the law, it does not matter. The common law disability of a married woman was that she could not sue in her own name; she sued by her next friend. She was under no other disability regarding the enforcement of her rights. Sec. 7 of the Practice Act removes this disability by declaring that when the action concerns her separate property, she may sue alone. Sec. 293 of the Probate Act applies Sec. 7 to Probate proceedings. The Courts are as open to a married woman, in her own name, concerning her separate property, as to any person. So, she may sue alone if the action be between herself and her husband. No one would claim that a married woman must sue by next friend, if she have a controversy with her husband concerning her separate estate, or wait for divorce or death; yet she is under disability in the one case as much as in the other. At common law, an infant is under the disability that he cannot sue except by his guardian, or next friend; now, if our statute provided that an infant might sue alone, it could hardly be contended that he was under disability to sue.

In *Leonard v. Townsend*, 26 Cal., 446, the Court held that Sec. 7, authorizing a married woman to sue and be sued alone, "removes the disability of coverture."

In *Wilson v. Wilson*, 36 Cal., 454, the Court, by Sawyer, C. J., say that "the present policy of the law is to recog-

nize the separate legal and civil existence of the wife and separate rights of property; and the very recognition by the law of such separate existence and rights, at law as well as in equity, to hold and enjoy separate property, involves a necessity for opening the doors of the judicial tribunals to her, in order that the rights guaranteed to her may be protected and enforced."

The object of Sec. 36 of the Probate Act is to give one year in which to contest the probate of a will, and that after that year all persons except those under disability shall hold their peace. It is wise that *some* time shall be limited; the wisdom of fixing *one year* is with the Legislature.

If it be correct that a married woman may sue alone regarding her separate property, I fail to see how she is under the disability that she cannot sue. The disability intended by Sec. 36 is not *coverture*; coverture is a condition; and disability (if it exist) is a result of that condition. The disability meant by this section is, an incapacity to contest the will or its probate; and if she may contest it in her own name, she is not under disability as to that. The section certainly cannot mean her inability to make a contract, or any other disability under which she may rest by reason of her coverture. The statute does not say that she may have the year after the removal of the coverture; but, one year after the *disability* is removed. If the disability be removed by statute, it is as much removed as if it were removed by death of the husband or divorce.

The petitioners had one year after the probate of the will in which to file their petition for revocation; failing to do so, they are barred.

Order made dismissing petition.

ESTATE OF JAMES McCLOUD.

January 2, 1873.

WILL.—Autograph will where testator died before the authorization of an olographic will by the C. Code and not attested by witnesses, is a nullity.

BY THE LAW OF WHAT DATE GOVERNED.—The law in force at the date of the death of the testator governs the formalities of attestation.

Construing section, C. C., 1375.

Deceased attempted to make a will in 1866; he wrote it and signed it with his own hand, but it was not witnessed. McCloud died before Jan. 1, 1873, when the new codes went into effect. Under the codes, no witness is necessary to an olographic will; but under the law as it existed at the death of McCloud, all wills must be witnessed.

By the COURT: The failure to have the paper witnessed is fatal to its validity as a will. The law in force at the death of a person furnishes the rule by which the validity of an alleged will is to be determined. Probate denied.

ESTATE OF JAMES BLACK.

No. 5889—April 2, 1874.

WILL.—INOFFICIOUS, AB IRATO. CHARGE TO JURY ON CONTEST OF PROBATE.

FACTS.—B. an old ranch settler in California, who was for many years a heavy drinker, in 1865 gave a ranch, together with stock, etc., to his married daughter, the wife of a dentist. B.'s wife died in 1864 while in the dental chair of her son-in-law. In 1866, B., and Mrs. P., a Spanish-Mexican widow, neighbor of B., intermarried, the bride having a family of six children by a former husband. Two months after the marriage, the will in contest was executed. Black by the will devised his entire estate (except some few friendly legacies), to his Executors in trust for his wife and stepchildren, excluding his own daughter on the ground that she was already provided for. B. died in 1870 aged sixty-six years. The daughter contests. GROUNDS:—RESTRAINT, UNSOUND MIND, ALCOHOLISM, UNDUE INFLUENCE, MISREPRESENTATION, HABITUAL INTEMPERANCE.

Construing sections, C. C., 1272; C. C. P., 1312, 1313, 1317.

S. V. Smith, S. M. Wilson, A. Campbell, Jr., for proponents.

J. M. Seawell, J. McM. Shafter, J. B. Southard, for contestants.

GENTLEMEN OF THE JURY:—Referring to a few of the facts developed by the testimony, as to which there is no controversy, we find that about the year 1832 James Black, the decedent, came to California and settled in what is now Marin County. He was of Scotch parentage, and had been a sailor. He was an unlettered man. He soon married, and a daughter was born to him. He obtained large tracts of land and settled thereon, and engaged in the then usual

business of pioneers, stock raising. He had about him numerous dependents, employees and tenants. He early became addicted to the use of intoxicating liquors. To what extent, and with what effect, will be for you to determine. Thus he and his family continued to live upon a tract of land, called the Nicasio or home ranch. In October, 1863, his daughter married, and is still a wife. Years before that, he had purchased a tract of over 6,000 acres, known as the Olompali ranch, and in 1865 deeded it to his daughter, Mrs. Burdell, and gave to her with it a band of cattle. In February, 1864, his wife died in this city, in the dental chair of her son-in-law, Dr. Burdell. Mrs. Pacheco, a widow, having six children, lived in the vicinity of Mr. Black, and owned with them a tract of over 6,000 acres. In January, 1866, Mr. Black and Mrs. Pacheco intermarried. In March, 1866, within about two months after the marriage, the paper here offered as a will was executed by Mr. Black. By the terms of this will, if it shall stand, all of his large landed estate and his personal property, except some devises and legacies to friends and relatives, go to the executors in trust for Mrs. Black, (formerly Mrs. Pacheco), and to her children by a former marriage, no children having been born of the second marriage. The paper expressly excludes his daughter, Mrs. Burdell, from having any share in his property, for the reason, as stated in the paper, that he had already given her a just portion of his estate.

Mr. Black died in 1870, aged about 66. If this will shall not stand, one half of this estate will go to Mrs. Black and the other half to Mrs. Burdell, and Mrs. Black's children and the other legatees and devisees will take nothing.

The proponents, the persons named as executors of the will, offer the paper as the last will and testament of Mr. Black and demand that it be admitted to probate. The contestant, Mrs. Burdell, resists, and claims that this paper is not the will of her father, for the reason, as alleged by her, that her father, at the time of signing the paper, was not of sound and disposing mind, that he was under restraint, undue influence and fraudulent misrepresentation. This controversy has been three times submitted to juries in Marin

County, and is now here for trial before you upon issues prepared in that county. Those issues I propose to consider in turn, and to state to you my view of the law bearing upon each.

1. The first issue is:

Is the paper now offered for probate, the last will and testament of James Black, deceased?

This issue is rather comprehensive, and was probably intended to embrace all the statutory provisions regarding the execution of wills, including the question as to whether any subsequent will had been executed. I will here consider generally the requisites of a valid will. As the law stood in 1870, at the death of Mr. Black, which is the law governing this case, the following were requisites to a will: It must be in writing, signed by the testator or by some person in his presence by his express direction, and attested by two or more witnesses subscribing their names to the will in the presence of the testator; and the testator must at the time of the execution of the will be of sound and disposing mind, and not under restraint, undue influence or fraudulent misrepresentation.

In this case, this paper offered as a will is in writing; the signature of the testator thereto is admitted; and the formal execution, so far as its being attested by two witnesses subscribing their names in the presence of the testator, has been duly proved. There is no evidence of the execution of any subsequent will. Therefore, if you shall find that the said James Black was, at the time of executing the alleged will, of sound and disposing mind and not under restraint or undue influence, and that there was no fraudulent misrepresentation, the paper is his will, and your answer to this question will be, Yes. But if you shall find that he was not, at the time of executing the alleged will, of sound or disposing mind, or if you shall find that he was under restraint, or undue influence, or that there was fraudulent misrepresentation, then the paper is not his will, and your answer to this question will be, No. This instruction, gentlemen, confines your investigation to the propositions whether Mr. Black

was of sound and disposing mind, not under restraint or undue influence, or fraudulent misrepresentation. As these propositions are embraced in issues following, I shall, in considering those issues, state to you the law relating thereto.

2.—Second issue:

Was the said James Black, at the time of executing the instrument now offered for probate, of sound and disposing mind, and competent to make a will?

If he was of sound and disposing mind, free from restraint and undue influence, he was competent to make a will. A person is of sound and disposing mind, who is in the possession of the natural mental faculties of man, free from delusion, and capable of rationally thinking, reasoning, acting and determining for himself. Weakness of mind is not the opposite of unsoundness. Weakness of mind is the opposite of strength of mind; and unsoundness is the opposite of soundness. Thus, a weak mind may be a sound mind, and a strong mind may be unsound. It is not impossible to find a strong mind, a man possessed of superior talents or of a determined will, so wrought upon by some delusion, as to be unsound; and a weak mind, a mind of what we call a lower grade of intellect, may be so evenly balanced as to be perfectly sound. It is not the weakness or strength of mind which determines its testamentary capacity; it is its soundness, that is, its healthy condition and healthy action. Lord Coke classifies persons of unsound mind thus: 1, An idiot or fool natural; 2, He who was of good and perfect memory, but by the visitation of God has lost the same; 3, Those who are sometimes of good and perfect memory, and sometimes *non compotes mentis*; and, 4, He who is unsound by his own act, as a drunkard. It frequently occurs that there is partial insanity, or monomania, unsoundness as to one or more persons, or upon one or more subjects, and soundness as to all others. This does not affect the testamentary capacity, in general; only as to the persons or subjects in regard to which the unsoundness exists. Thus, a person may be of sound mind upon all subjects but one;

and a will is good unless it be the result of that particular unsound state of mind. Monomania consists in a mental or moral perversion, or both, in regard to some particular subject or class of subjects; while in regard to others the person seems to have no such morbid affection. The degrees of monomania are very various. In many cases the person is entirely capable of transacting any matters of business out of the range of his peculiar infirmity; and as to those matters out of that range, he may be entirely sound, while as to matters within the range of the infirmity he may be quite unsound.

[1 Red. on Wills, 72, etc., par. 6, etc.]

Whenever it appears that a will is the direct offspring of partial insanity or monomania, it should be regarded as invalid, though the general capacity be unimpeached.

Unsoundness of mind may be the result of disease, drunkenness, or of one of many other causes. In case of drunkenness, there are two conditions, a will made under either of which is invalid, viz: Where the will is made during the period while the person is overcome by the delirium of intoxication, or, where the use of intoxicating drinks has been so extended and so excessive as to permanently disable the mind. But in either case the effect must be to have either temporarily or permanently overcome the judgment and unseated the reason.

A person of sound and disposing mind has a right to make such disposition of his property by will as to him may seem fit. If a person be of sound and disposing mind, it is not for you or me to pronounce against his act. The will should be *his* will, not yours or mine; he is not bound to consult any person as to the propriety of any provision thereof. But he must be in such mental condition *that it be his will*, rather than the ebullition of a disordered intellect.

A person may be said to be of sound and disposing mind who is capable of fairly and rationally considering the character and extent of the property to be disposed of, the persons to whom he is bound by ties of blood, affinity, or friendship, or who have claims upon him, and the persons to

whom, the manner and the proportions in which, he wishes the property to go.

In order to apply these principles to the case in hand, you can ask yourselves such questions as these: Was Mr. James Black at the time of the execution of this alleged will, of sufficiently sound mind that he could fairly and rationally consider the character and extent of his large landed and personal estate? Could he then recollect of what it consisted;—that he owned one tract of land here, another there, and a third beyond; that he had bands of cattle, and money at interest? Could he fairly and rationally consider those bound to him by ties of affinity and of blood, viz, his wife, his daughter, his sisters and his sisters' children? Could he fairly and rationally consider the ties existing between himself and the children of his wife, and between himself and his dependents and friends? Could he fairly and rationally consider and determine for himself, the persons to whom he wished this large estate to go? Could he fairly and rationally consider and determine that he wished to disinherit his daughter and prevent her from having any share in the estate then being disposed of; that he wished the few friends and relatives to have the lands and money named for them respectively, and that he wished all the balance of the estate to go to the persons named as executors in trust for his wife and her children? Could he fairly and rationally consider and determine that he wished the persons named as such to act as executors, they to act without bonds, with power to sell any portion or all of the estate, real and personal; that he wished the title to his estate to go to his executors in trust, they to invest the rents of real estate and the proceeds of personal property, render to Mrs. Black and her children sufficient for their maintenance, and retain the balance and the proceeds of sales of real estate until Mrs. Black's children should respectively attain the age of twenty-five years?

Could he, on the 22d of March, 1866, at the time of executing this paper, fairly and rationally consider and determine all these matters? If yea, then, so far as the subject

now under consideration is concerned, the paper is his will, and should stand; but if nay, it is not his will.

This paper contains a statement that Mr. Black does not make any provision in the will for his daughter, for the reason that she already had a just share of his estate. Had he also sufficient mental capacity to consider and determine for himself whether or not she already had a just share? It is not for you, gentlemen, to determine whether or not she already had a just share; that matter was for him to determine. If he was of sound and disposing mind, you have nothing to do with the propriety or impropriety, the justice or injustice, of any bequest or omission. You may take into consideration the reasonableness or justness of any provision in the will for the purpose of ascertaining the condition of Mr. Black's mind, and for that purpose only. If you find from the facts that Mr. Black does not give his daughter any of his estate, that he gives the bulk of his property to the executors in trust for his wife and her children, or from any other provision in the will, any evidence of unsoundness, then you may take such provisions into account; but not otherwise. You are not here to correct this will and make it conform to your views of right; you are here to determine whether this paper is the result of a rational, sound and disposing mind, or whether it is the outgrowth of a mind diseased, broken, and out of joint.

It would seem to each of you that one of the first objects of his solicitude, if not the first, should be to provide amply in his will for his only child; and it may perhaps seem unkind if not cruel to fail to do so; but if he was of sound and disposing mind, he had a right so to do. Was he under a delusion respecting his daughter—if so, the paper is not his will in that regard. Delusion is the belief of things which do not exist, and which no rational mind would believe to exist, and a will which is the offspring of such delusion is invalid. It is said that he was induced to disinherit his daughter by reason of his dislike of Dr. Burdell. Was there such a dislike? If yea, was there any foundation for it; or, was it a delusion, and did that delusion control him? Delusion is an effect of insanity. Insanity may exist with-

out there being delusion—but delusion never exists unless the mind be unsound to a greater or less degree. Delusion, the having delusive ideas, belief in the existence of things not existing, which no rational mind would believe, is insanity.

Gentlemen, take the testimony of all the witnesses—believe that which impresses you with truth—and decide these questions—not from fancy or caprice, but from calm, deliberate judgment.

3.—Third issue:

Did the said James Black, at the time of signing the instrument offered for probate, sign or execute the same under restraint?

Restraint is that kind of influence which is exercised by force, or threats, or coercion, physical or mental, which the testator is not able to resist, or from fear, by which the testator is prevented from exercising and expressing his own judgment and desire. I find in this case no evidence of any act of restraint exercised at the time of executing the will. To avoid a will, it is not necessary that threats, or violence, should have been practiced or resorted to at the time of making it, but it is enough, if the will was made after the threats or violence, under the general controlling and continuing influence of fear or dominion over the testator by the person who so put him in fear.

4.—Fourth issue:

Did the said James Black, at the time of signing the instrument offered for probate, sign or execute the same under undue influence.

This issue, and the principles governing it, are entirely different from the principles applying to unsoundness of mind. Undue influence is entirely distinct from unsoundness. A man may be of sound and disposing mind, and yet be the victim of undue influence. If Mr. Black was of unsound mind, it is entirely immaterial whether or not any person exercised undue influence, because unsoundness would of itself incapacitate him from making a will, influ-

ence or no influence. A man even of sound mind, must be left free to exercise his own judgment and wish in making his will. Not that friends and relatives and legal adviser may not make suggestions and recommendations, but the person must be free to exercise his own wish, notwithstanding such suggestions and recommendations. Undue influence is that kind of influence which prevents the testator from exercising his own judgment, and substitutes, in place thereof, the judgment of another.

[1 Jarman on Wills, p. 36.]

The question to determine here is, whether at the time of executing this will, Mr. Black was free to do as he pleased, or whether he was then so far under the influence of any other person that the will is not Mr. Black's will, but is the will of that other person.

You should indulge in no guesses or surmises; but you should be convinced. Of course, persons who intend to control another's actions, especially in regard to making a will, do not proclaim that intent. Very seldom does it occur that a direct act of influence is patent; the existence of the influence must generally be gathered from circumstances—such as, whether he had formerly intended a different disposition of his property; whether he was surrounded by those having an object to accomplish, to the exclusion of others—whether he was of such weak mind as to be subject to influence—whether the paper offered is such a paper as would probably be urged upon him by the persons surrounding him—whether they are benefited thereby to the exclusion of formerly intended beneficiaries.

[1 Red. on Wills, p. 514, etc.]

Take all the testimony, and see whether there has been in this case any undue influence—such influence as prevented Mr. Black from expressing in this paper his own wishes, and has caused him to express the wishes of some other.

5.—Fifth issue:

Did the said James Black, at the time of signing the instrument offered for probate, sign or execute the same under fraudulent misrepresentations?

That is, was he induced to execute this will under the representations by any persons that certain things existed which did not in truth exist, which he could not by reasonable inquiry ascertain to be false, and which caused him to make a will different from what he otherwise would have made? Was anything intentionally done by any person to prevent Mr. Black from knowing any of the contents or the effect of any of the contents of this will? Was he intentionally prevented from knowing what disposition he was making of his property?

6.—Sixth issue.

Was the said James Black induced to sign or execute the said instrument by means of undue influence on the part of Maria L. Black?

Elsewhere I give you instructions regarding undue influence in general, and in considering this issue you will apply those instructions so far as they relate to acts of Maria L. Black, and make answer as you find the fact to be.

7.—Seventh issue:

Was said James Black induced to sign or execute the said instrument, and to disinherit the contestant, by means of fraudulent misrepresentations against the contestant Mary A. Burdell and her husband, or either of them, by said Maria L. Black or any other, and what person or persons?

You will apply what I have already said concerning fraudulent misrepresentation to the facts developed by the evidence, and make such answer as you shall find to be the fact.

8.—Eighth issue:

Was the said James Black, at the date of said instrument, and for a long time prior thereto, habitually intemperate?

There is no principle of law especially applicable to this issue—It is purely a question of fact, and you are to answer it from all the testimony in the case.

9.—Ninth issue:

Was the mind of said James Black, at the date of said instrument, so impaired by habitual intemperance that he had not sufficient capacity to make a will?

This issue includes many of the principles suggested in reference to unsoundness of mind. The law books, medical treatises, and our own observation, testify to the fact that the inordinate use of intoxicating liquor does incapacitate men from making wills. We know that it vitiates the blood, produces softening of the brain, disorders the intellect, saps the vital forces, unsettles the healthy action of body and mind, and destroys them both. Yet not in every case of the use of liquors do these results follow. Some men live on, from year to year, drinking largely, attending to their own affairs, and occasionally reach ripe old age. Others break soon. There is no rule by which to determine how much the system of any one man can endure. One man may be sensibly affected by a single debauch, while another may remain sound in mind after many of them. As before remarked, a man temporarily overcome by a single debauch is for the time being of unsound mind and has not testamentary capacity; so, a person to whom intoxication has become such a custom that his intellect is disordered and he has lost the rational control of his mental faculties, is of unsound mind. In response to this issue you are to determine the condition of James Black in this respect. Was his mind vigorous and active, in its normal condition, or was it so enfeebled by his intemperate habits that he could not fairly and rationally consider the character and extent of his property, his relations to others, his ties of blood, affinity and friendship, his duties and responsibilities, the persons to whom and the proportions in which he wished his property to go? As you find the fact to be, so make answer.

10.—Tenth issue:

Did said James Black, at the time of signing said instrument, know or understand the true meaning and construction of said will?

This is rather an uncertain issue. If he was of sound and disposing mind, free from restraint, undue influence and fraudulent misrepresentation, the law presumes that he knew and understood the true meaning and construction of said will. If he was not of sound and disposing mind, then, so far as that unsoundness extended, he could not understand the true meaning or construction of the will. If he was under restraint or undue influence, it is immaterial whether or not he knew or understood it; because, not being able to express his real wishes, his knowledge that he was not expressing his real wishes was not material. If he was laboring under the effect of fraudulent misrepresentations, he might, so far as those representations are concerned, have known the true meaning and construction of the will, but the instrument would be invalid on account of having been produced falsely.

I can give you no certain guide to aid you in responding to this issue, further than to say, that if your answer to the other issues shall be to the effect of sustaining the will, your answer will be yea, to this issue. Otherwise, not.

ESTATE OF CLAUS BEVERSON.

No. 4539 — May 7, 1873.

MARRIAGE, EVIDENCE OF.—MERETRICIOUS COHABITATION WITH OR WITHOUT PROMISE OF FUTURE MARRIAGE does not constitute a marriage.

Construing sections, C. C., 57, 68; C. C. P., 1963; affirmed 47 Cal. 621.

J. B. Hart, for petitioner.

C. Bartlett, for executor.

The petitioner, styling herself Tilly Beverson, claims that she was the wife and is the widow of deceased, that her son Orrin is his child, and that they are entitled to a family allowance.

The petitioner, Delia or Tilly as familiarly called, was married in 1862, at the age of fifteen years, in New York, to one Platt. Three or four months after the marriage Platt

left her, and in 1864 he came to California. She remained in New York until September, 1865, when she also came to this State. Platt was at the steamer when she landed in San Francisco, and she saw him then and occasionally afterwards during the two months next after her arrival. In January, 1866, she became acquainted with Beverson, who was keeping a grocery and liquor store in this city; she at the time conducted the business of dress-making. About two years after her arrival here, they became intimate, under a mutual promise of marriage; but their relations were conducted in such a manner that none knew of them but themselves, and they were known as unmarried people. He visited her and took her to places of amusement. These relations continued until June, 1868, when Beverson left for Europe. In November, 1868, the ceremony of marriage was performed between herself and one Augustus Spencer, she thinking that her husband Platt was dead. In January, 1869, Beverson returned from Europe. Petitioner was then living at Petaluma with Spencer as her husband, and she was known there as Mrs. Spencer. In April, 1869, Beverson visited her and told her that Platt was still alive. She thereupon withdrew from Spencer, returned to this city, and resumed her relations with Beverson. She soon, at the instance of Beverson, instituted proceedings for a divorce from Platt, Beverson paying all expenses, and being a witness in the case, and a divorce was granted Oct. 27, 1869. Her child Orrin was born February 14, 1870. At the instance of Beverson, petitioner took rooms of Mr. and Mrs. Nelson, who kept a grocery store and had rooms over the store.

The petitioner testified in substance as follows:

“While living at Mrs. Nelson’s I was engaged to be married to Beverson. Soon after the divorce from Platt he promised to marry me; we were to be married before the birth of the child; it was born before the time, and so we did not get married, and then we were to be married when I was well enough to do so. He took rooms at Mrs. Kruger’s, and introduced me as Mrs. Beverson. The agreement to marry was broken off, and I went to Third street. I was to be married a week after we left Mrs. Kruger’s. Went to

Third street as Mrs. Beverson. The child was his; he recognized it as his; he had it on the street in a buggy a week after we went to Third street. We lived on Third street three weeks. Decedent and I dissolved because he did not marry me as he promised. I thought I was not his wife because there was no ceremony said before a priest, preacher or justice of the peace, so I left. I did not wish to live with him without a ceremony, and I did not want to raise my child and others as bastards. Decedent rented the house on Third street; I bought furniture and he paid for it. We had a quarrel at the time we separated; I went to Washington Territory and I never again saw decedent alive."

Mrs. Nelson testified that petitioner came to her house as Mrs. Spencer; hired rooms. Beverson was a particular friend of my husband. He came sometimes to visit her. I heard him tell her that he was going to be married to her. He spoke of our children and said we could have a christening and wedding together. When she came to my house, Oct., 1869, she came as Mrs. Spencer; she said she would not live with her husband; that Beverson had promised to marry her, and she would live with him.

Mrs. Kruger testified that the petitioner, Mrs. Spencer, lived at her house January, February and March, 1870; the child was born there Feb. 14, 1870; Beverson came there to see her; she was Mrs. Beverson during the three months; they were going to be married before the child was born; also after its birth; I heard them talking that they were going to get married; they were always talking about it. He did not say much to me about the child; he was there at its birth; took care of it; took care of it nights; did things for it. Before the child was born she said she was going to marry Beverson. I knew Mrs. Spencer in New York, eleven or twelve years before. I saw her once in a while. Saw her and decedent at a dancing party some years ago.

The petitioner, in the fall of 1871, representing herself to be the widow of Spencer, obtained \$60 aid from a Masonic Lodge of which Spencer had been a member. She nursed Spencer in May, 1871, in his last sickness; lived with him and occupied the same room with him; the child

passed as Spencer's child; it called him father, and he called it his. He died in May, 1871, and she attended his funeral as his widow. After his death she visited Washington Territory as Mrs. Spencer. After Beverson died she returned to this city and went and now goes as Mrs. Spencer, and the child as Orrin Spencer.

Petitioner claims that the above facts show an actual though not ceremonial marriage between herself and Beverson.

By the COURT: The facts in this case do not display an actual marriage. Their relations were meretricious from beginning to end. At best, it was a cohabitation with a promise to marry at *some* time; not a present agreement of marriage. The petition is dismissed.

ESTATE OF MARGARETHA PFUELB.

No. 2790—May 7, 1873.

WILL, DEVISE.—The word, *devise*, may cover property other than real estate, notwithstanding its primary signification.

STEP-SON—A stepson is not such a relation as would, under Sec. 1310, C. C., prevent a legacy from lapsing.

Construing sections, C. C., 1310, 1331; affirmed, 48 Cal., 643.

Gray & Haven, for applicant.

George & Loughborough, contra.

Deceased made a will by which she bequeathed \$4,000 to her step-son. The step-son died before the testatrix, leaving a daughter, who now applies for distribution to herself of the \$4,000.

LOUGHBOROUGH—The legacy lapsed, as the devisee died before decedent, and the applicant is not within Sec. 20 of the act concerning wills. The applicant is not a relation. That act refers only to a devise of real estate.

[Bouvier and Burrill, titles "Devise" and "Relation."]

HAVEN—Conceding that at common law the legacy would lapse, and that in a narrow sense “relation” means blood relation, Sec. 20 does not restrict us to this construction. (36 Cal., 329, as to devise.) The statute uses these words, legacy and devise, as convertible terms. The New York statute says, “may devise real and personal property.” 1 Bradf., 116. The popular meaning of the word “relation” should be taken. Webst. Dic. adopted, 2 Sand. Ch., 506. Meaning of this statute: 3 Bradf., 317; 7 Mass., 86; 18 Pick., 43; 1 Vesey, sen., 84. The statute should be construed liberally. Sedg. on Stat., p. 317, 379, 285; 15 Mass., 206; 7 Mass., 524; 12 Mass., 384.

By the COURT: Testatrix published her will June 19, 1869, bequeathing a sum of money to “Louis Washington Johanning, my step-son, he being the son of my former husband, Louis Johanning, by a former marriage.” Louis W. died May 19, 1872, leaving him surviving one child, the petitioner. Testatrix died Sept. 22, 1872. Petitioner asks for distribution of the legacy, claiming the same as heir of Louis W. The executor resists the application on two grounds: First, that under Section 1310, C. C., the term *devise* limits the application of the section to real estate; Second, that Louis W. was not a relative of testatrix, and the legacy lapsed, he dying before testatrix. The first point is not well taken. The word *devise* is generally applied to passing real estate by will, but is not necessarily exclusive. The second point is well taken. A step-son is not a relation within the meaning of Sec. 1310, C. C. *Esty, adm’r, v. Clark*, 101 Mass., 36, is a decision under a similar statute, and is directly in point. It is there decided that a wife is not a relation of the husband within the meaning of the statute, and that her son by a former husband will not succeed to her rights by virtue of the statute. Petition denied.

ESTATE OF JOHN FUSILIER.

No. 5217—May 12, 1873.

WILL, ATTESTATION OF.—On the execution of a will, the witnesses must in some way, either by word or act, be informed by the testator personally or by some one speaking for him, in his presence, that the document is his will. A mere tacit signing by the testator with attestation by the witnesses is not enough.

Construing section, C. C., 1276.

H. C. Newhall, for proponent.

C. McC. Delany, for contestant.

A paper is offered for probate as the last will of deceased. On the hearing, the following facts were made to appear:

Deceased and A. F. Durney were friends; Durney suggested to deceased that he have his will prepared and executed, deceased being in declining health; they accordingly went to the office of W. W. Stow, Esq., an attorney of character and standing, and deceased, without any suggestion by Durney, gave instructions to Mr. Stow to prepare a will, giving specific directions as to the disposition he wished to make of his property, saying that as his present wife was already sufficiently provided for, he wished all of his property to go to his children by a former marriage. Deceased was of sound and disposing mind, but in ill health. Some days thereafter, deceased called at the office of Mr. Stow. The draft of the will was ready, and Mr. Stow read it to Mr. Fusilier, who pronounced it correct and requested that it be engrossed and sent to the Hibernia Bank, that he might there execute it. Mr. Stow gave him specific directions as to the necessary legal formalities to be observed in its execution. Mr. Stow's clerk engrossed the will according to the draft, and took the paper to the bank and left it with Mr. Durney for Mr. Fusilier. Mr. Durney was an officer of the bank. By arrangement between Durney and Fusilier, Fusilier was to meet the will there. Durney and John Wintzen were named in the will as executors. On a succeeding morning Mr. Fusilier went to the bank and approached the counter. Mr. Durney, and Joseph Nolan, and W. J. Conolly, clerks of the bank, were behind the counter. Mr. Durney produced the paper, placed it on the counter before

Fusilier, and pointed out to him the place to sign; Fusilier signed at the place indicated, and Durney turned the paper to Nolan and Conolly and requested them to sign, pointing to the place; they signed as requested. Both witnesses saw Fusilier sign, and he saw them sign. Both witnesses were sworn and examined on the hearing. Nolan had no recollection that the word "will" was used by any person; did not recollect that Fusilier made any declaration or said anything of consequence; he may have made some passing remark. Conolly clearly recollected that the word "will" was not used, nor anything said by any person about the paper being a will or testament, nor was any declaration made in words by Fusilier or any other person; that no words passed between Fusilier and the witnesses about the business in hand. Conolly knew that a will was being executed, from the fact that before Fusilier came in, Durney said to him (Conolly) that Fusilier would be in to execute his will, and he wanted him (Conolly) and Nolan to witness it.

It is objected, on behalf of the widow, that there was no declaration as required by law.

By the COURT: The objection is well taken. The code provides that "the testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will." The declaration may be by words or acts, it may be done by the testator in person or by some person in his presence and by his authority; but in some way, *and at the time*, the witnesses must be informed *from the testator* that he wishes them to understand that the paper is executed as his will. In this case, there was at the time no declaration.

There is no doubt that the paper was prepared as Fusilier desired, and that he intended to execute it as his will; all parties acted in perfect good faith, and no suspicion of unfair dealing can attach to any person. But the decisions of other States under similar statutes are so conclusive upon the point that I have no discretion. It is the misfortune of the devisees that Fusilier did not carry out the instructions of his attorney.

See *Brinkerhoff v. Remsen*, 8 Paige, 488; *Chaffee v. Bap. Mis. Com.* 10 Paige, 85; *Van Hooser v. Van Hooser*, 1 Brad., 365; *Hunt v. Mortrie*, 3 Brad., 322.

Let a decree be made refusing to admit the paper to probate.

ESTATE OF MARTIN CAMETO.

No. 5065—May 19, 1873.

HOMESTEAD UPON A LOT HELD BY CLAIMANT AS TENANT IN COMMON—RESIDENCE to comply with the act authorizing a claim of homestead in such case, (March 8, 1868, stat. 1867-8, p. 116), must be the principal use to which the premises are devoted. Living over a shop used by both the tenants in common as a place of business, is a secondary purpose.

The Homestead amendment of 1862, (statute 1862, p. 519,) abrogated the necessity of a written abandonment of homestead; and to keep a claim to a homestead alive so as to be available in this court, there must have been an actual residence *continuously* to the date of the death of decedent.

FAITHLESSNESS OF WIFE.—A wife who, prior to her husband's death, has been notoriously unfaithful to him, and is not a member of his family at his death, is not entitled to have a homestead set apart to her by the Probate Court.

Construing sections, C. C., 146, 1237; statutes 1867-8, p. 116; statutes 1862, p. 519.

G. W. Tyler, for widow.

George & Loughborough, for executor.

Stuart S. Wright, for son.

By the COURT: In January, 1864, Martin Cameto and one Dupuy jointly purchased the premises described in the petition, and went into possession. In March following, they commenced carrying on the blacksmithing business upon the premises as copartners, which business was continued by them thereon until the death of Cameto in 1872. Cameto and petitioner intermarried in May, 1864. Up to that time the premises had been occupied by the partners in the following manner: At the end fronting on Broadway street was a two-story building; the ground floor was occupied by them as a blacksmith shop, and they rented the upper story to a family (tenants), except one small room occupied by Dupuy, he being then a single man. Over the rear end of the lot

was a building 20 by 20, set upon frame work so as to be on a level with the second story of the front building. Between the two buildings was an open space of about fifty feet. The whole ground of the lot was used by the partners in the business, the ground floor of the front building being the blacksmith shop proper, the open space being used for various purposes, and the ground under the rear building being used as a work shop and store and lumber place in the business. Cameto occupied the rear building over the work shop and lumber place. On one side of the front shop was a side door and stairs leading to the second story, and from this an elevated passage-way led over the open space to the rear building; this was the only outlet, and was used in common for both houses.

This was the condition of things when petitioner and Cameto married, in May, 1864. They were married in the rear house, and immediately commenced house-keeping there, the family consisting of Cameto and wife and her father. Cameto was over forty years of age, and she under twenty. From 1868 the minor son of Cameto by a former wife was a member of the family and lived with them. The occupation of the premises as above indicated continued until about October, 1870, except that in 1869 Dupuy married, and thence occupied the rooms over the blacksmith shop; the open passage way being changed to the other side of the lot and an addition to the front building being made.

June 11, 1864, the petitioner made, filed and recorded her declaration of homestead, which describes the entire lot by metes and bounds.

About October, 1870, Cameto and wife removed from the premises to a brick house owned by Cameto on Polk lane, where they kept house in three rooms of the upper part, renting the balance to tenants. Her father had died meanwhile.

The partners continued the business as before on the premises on Broadway, and continued to be the owners of the property as tenants in common.

In April, 1871, the petitioner left her husband and his residence at the brick house, and took a room for herself in

another part of the city, and did not return to him, but maintained herself. Cameto continued to reside at the brick house, and died there December, 1872, testate, and Dupuy is his executor. The inventory has been returned, which includes the brick house and lot, and the undivided one-half of the lot described in the petition.

The application that the premises described in the petition be set apart to the widow as a homestead must be denied. The premises were at the time of the declaration of homestead, and have been ever since, owned by Dupuy and Cameto as tenants in common. Neither Cameto nor his wife nor both ever had such exclusive occupation of the premises or any part thereof as is contemplated by the act relating to homesteads of March 8, 1868 (Stat. 1867-8, p. 116), giving a tenant in common a right to claim a homestead to the extent of his interest. They did not have any exclusive occupation of the lot; the house occupied by them was set upon a frame, beneath which was the shop and store place of the firm, used by the firm. The business of the firm was the principal use to which the premises were put; the residence of the partners and their families thereon was secondary. I do not think that petitioner ever had any right of homestead in any portion of the premises. Even if the petitioner ever had a homestead right in these premises, I think it was abandoned.

The amendment of 1860 to the Homestead Act restricted the mode of abandonment to a written declaration; but the amendment of 1862 (Stat. 1862, p. 519) took away the restriction; and in order to keep good a declaration, the premises must, within the principle of *Gregg v. Bostwick* (33 Cal., 220; *Estate of Delany*, 37 Cal., 176, and *Gambetti v. Brock*, January, 1871,) be occupied, actually or constructively, by the family at the time of the death. In this case, the family had moved away to another house owned by deceased, and did not return to the premises in question. Worse than that, she was not, at the time of his death, a member of his family in fact.

So much as to the application to set apart the premises described in the petition.

Upon the hearing, the petitioner's counsel verbally asked the Court, that in case the petition should be denied as to the lot on Broadway street, then the Court set apart to the widow a homestead under the last clause of Sec. 1465 of the Code of Civil Procedure. This request must also be denied. The petitioner heretofore made application for family allowance, upon which a full hearing was had; and from the evidence I was satisfied that she left her husband without legal cause, and committed adultery, and that the same was not condoned. No evidence of the adulterous matters was offered on this homestead application; but as the parties now before the Court are the same, and the rights now claimed arise from the same marital relations, I cannot altogether discard the former hearing. Believing as I do, from the testimony given on the application for family allowance, that the petitioner left the home of Cameto without legal excuse, and that she afterwards lived in an adulterous manner, and that she did not, at the time of the death of deceased, reside with him, and was not entitled to be considered a member of his family, she is not entitled to a homestead out of his estate.

The homestead to be set apart under the latter clause of Sec. 1465, is to be for the use of the surviving wife and minor children. The children have a right to be considered. (See Sec. 1468.) The decedent left a minor son by a former marriage, now living. The Legislature can hardly have contemplated that a faithless wife may, after the husband's death, take her paramour back to the dead husband's house and bed, and compel the son to witness his father's dishonor or seek a home elsewhere.

The case of *Lies v. DeDiabler*, 12 Cal., 327, cited by petitioner, is not in point in this case. That part of the opinion (last paragraph but two) apparently applicable, is, in my opinion, overruled in effect by the cases above cited; because, if, where a declaration is made, residence at the time of death is required, of course no right can be acquired where there is no declaration, unless the applicant was, or was entitled to be, at the death of decedent, a member of his family and a resident with him.

ESTATE OF HENRY W. HALLECK.

No. 4615—June 16, 1873.

CLAIM AGAINST ESTATE OF EXECUTOR not *contingent*, but absolute upon Executor's death. If not presented within the ten months, it is barred.

OPPOSITION TO DISTRIBUTION must state that there is a liability, unsatisfied, of a certain and definite amount or nature. It is insufficient to allege that there are unsettled accounts between the deceased Executor and his trusts; it is material that on the settlement of such accounts, there is a balance *due* from the Executor to his trust.

Construing section, C. C. P., 1493; affirmed, 49 Cal., 111.

R. W. Hent, for creditors of the Folsom Estate.

W. P. C. Whiting, for admr. of an heir of Folsom.

C. Bartlett, for Mrs. Halleck.

Selden S. Wright, for infant son of Halleck.

This is on proceeding for the settlement and distribution, according to the will, of the estate of General H. W. Halleck, late of the U. S. A. The usual statutory proceedings for administration have been had, notice to creditors has been given, and the time for presentation of claims has expired, all claims presented have been paid, and the estate is now ready for distribution, unless the distribution should be postponed for the reasons hereinafter stated.

The estate of J. L. Folsom, deceased, has been pending in this Court some nineteen years, and is still unsettled. General Halleck was, until his death, one of the executors of the will of Folsom. Claims against the estate of Folsom were allowed and approved, which, with the interest, amount to large sums, and are still unpaid. The creditors of the Folsom estate now claim that they, as such, have contingent claims against the Halleck estate, alleging maladministration by Halleck of the Folsom estate; that they have the right to present the same at any time before distribution, notwithstanding ten months have elapsed; and that the distribution of the Halleck Estate should be deferred until an investigation can be had and the amount of the liability of the Halleck estate to the creditors of the Folsom estate can be ascertained.

Mr. BARTLETT—Being a creditor of the Folsom estate does not make a person interested in the Halleck estate. Upon the death of Halleck, the trust of the executors remained, and the surviving executors must complete the administration. If General Halleck was a defaulter to the Folsom estate, his sureties were able to respond, he having given security in \$12,000,000. A claim against the Folsom estate was not a contingent claim against the Halleck estate. Neither Halleck nor his executors had undertaken to pay the Folsom debts; the obligation was to administer the estate faithfully for the benefit of all concerned. The opposition merely allege that Halleck's accounts were unsettled. That is insufficient. It must go further, and allege that Halleck had wasted the estate, and give particulars. The Court cannot presume that an executor has done an unlawful act. At this moment the Folsom estate is exhausted; it is largely insolvent. Much of the money never came to Halleck's hands; he is not responsible for the amounts received by his co-executors.

Mr. WHITING—The creditors of the Folsom estate have not been in a position until the present time to affix any liability upon the Halleck estate. There is no direct claim against the Halleck estate, but time is asked for the purpose of examining the final account and in order to press a contingent claim. Until the presentation of the final account there had been no opportunity to take action.

The COURT—Upon whom rested the burden of presenting an account in the Folsom estate? Did it rest upon the executor of the executor? Though the law was different in England, in this State a person is not an executor of an executor. Can an executor of the Halleck estate be compelled to file the accounts of Halleck as executor of the Folsom estate?

Mr. WHITING did not know that they could compel the executor to account, but it is his duty to ascertain the liability. There is no allegation of malfeasance, but the responsibility of the duty is admitted.

The COURT—Is the burden on the executor of the Halleck estate to show that there is no liability from it to the Folsom estate, or is the burden upon those who are interested in the Folsom estate to show that the Halleck estate is and should be held to be liable to the Folsom estate?

Mr. WHITING—Undoubtedly the burden is upon the Folsom estate, but heretofore the parties have not been in a position to take action.

Judge WRIGHT—The opposition has no standing in Court. Annual accounts in the Halleck estate had been presented; to these there had been no objection; the settlements therefore operated conclusively against all persons who ought to have opposed them.

Mr. HENT—The annual accounts are not to be taken as conclusive. They are simply credits and debits, and should not contain the property of the deceased. Our petition states that on account of waste or mal-administration, the estate of Halleck is liable to the creditors and heirs of the Folsom estate in a large sum of money, the amount of which it is now and will be impossible to ascertain until the accounts of Halleck as executor have been presented and settled; that the estate of Halleck is not in a condition to be closed. The only way to ascertain the liabilities of Halleck was to ascertain his condition at the time of his death with reference to the Folsom estate; and how was that to be done except in the manner proposed?

The COURT—The opponents are bound to show that an indebtedness exists from the Halleck estate to the Folsom estate. No facts are stated which would justify the conclusion that such indebtedness exists. Conclusions are stated, but not facts. The question for consideration here is, who are interested in the Halleck estate? The answer is, creditors and legatees. Are the opponents now here, creditors of the Halleck estate? If a claim is not presented within ten months from the first publication of the notice to creditors, it is barred forever, unless not then due or contingent.

W. C. Mack
The opponents claim that they have contingent claims against the estate of Halleck, arising thus: Halleck was co-executor of the estate of Folsom, and the claim is made on account of alleged mismanagement of the Folsom estate, extending over a period of seventeen years prior to Halleck's death. Now, if the executors had been guilty of any neglect amounting to mal-administration, this Court had been open during the entire period for an application to remove them. If Halleck and his co-executors were guilty of mal-administration, there was the direct liability of the surviving executors and the bondsmen of Halleck. Any liability of Halleck was full and complete at the time of his death. It was ascertained and determined then. The amount of his liability may not have been computed, but it was ascertained and determined, in this, that no act by any person could increase or enlarge his liability. There is a time within which creditors must present their claims, and if a person comes even one hour after the time, his claim is barred. If he do not present his claim within the time, he alone is at fault. If Halleck at his death was indebted to the Folsom estate, the surviving executors were the persons to present the claim; they could be required to do so or be removed. It is not the fault of the executors of the Halleck estate that no action was had. The claims now urged are not contingent. A contingent claim is one depending upon something thereafter to happen. There was nothing to happen after the death of Halleck to fix the liability of his estate, except the presentation of the claim.

As no claim has been presented for allowance and approval, the application to postpone the settlement and distribution of the Halleck estate must be denied, and the estate distributed.

ESTATE OF HOWARD CRITTENDEN.

No. 4511—Feb. 20, 1873.

WILL.—CHARGE TO JURY ON CONTEST OF PROBATE.

NARCOTICS.—INOFFICIOUS WILL.—MENTAL INCAPACITY arising from the OPIUM HABIT.
UNDUE INFLUENCE.ATTESTATION.—NO FORMAL ATTESTING CLAUSE NECESSARY.—REQUEST TO WITNESSES
TO SIGN.—NEED NOT BE A DIRECT REQUEST.

Construing sections, C. C., 1270, 1272, 1276; C. C. P., 1312, 1313, 1317.

Williams & Thornton and *C. T. Botts*, for proponents.*Jas. L. Crittenden & J. M. Kinley*, for contestants.*R. W. Hent*, for minor heirs.

The Court charged the jury as follows:

As to the first issue:

Was said Howard Crittenden of sound and disposing mind at the time of the alleged execution of said will?

A person is of sound and disposing mind, who has mental capacity to fairly and rationally consider the character of the property to be disposed of, the nature of the ties of blood, affinity, marriage or friendship, the persons to whom he wishes his property to go, and the means of disposing of it.

The question of strength or weakness of mind does not enter into the consideration of this issue; you are to look only to soundness or unsoundness. Thus, a person of naturally strong mind may be by sickness or other distress so reduced physically as to be quite inadequate to fully grasp and comprehend some abstract proposition of the exact or natural sciences, and yet be able to comprehend his property and determine whom he desires should be the recipients of his bounty. So, a person of *weak* mind may not understand or be able to comprehend the theory of the solar spectrum, and yet be able to dispose of his estate by will. So, a weak mind as well as a strong mind may suffer under distress caused by affliction, and yet be able to attend to the affairs of life. You may ask yourselves, Was Howard Crittenden, at the time he executed this instrument, capable of under-

standing and appreciating the business in hand? There appears to be no evidence of insanity as it is understood in the popular meaning of the word. You should, however, be satisfied from the evidence as to whether he was of sound and disposing mind, or whether his mind was so affected by disease or otherwise as to disqualify him from making a will. If he had sufficient mental capacity to fairly and rationally consider the nature of the property to be disposed of, the persons having moral or other claims upon him, his relations, friendships, duties and obligations, and the persons to whom, and the proportions in which he wished his property to go, he was of sound and disposing mind; but if his mind was so affected by disease or otherwise to an extent that his mental faculties were incapable of so judging and determining, then he was not of sound mind. Did Howard Crittenden understand of what his property consisted? Was he capable of considering who his relatives and friends were? Did he desire that his mother should have the proportion named to her, and that his sister and brother, mother-in-law, sister-in-law, and Mrs. Brooks, should have the proportions respectively named to them? It is not for you, gentlemen, to determine whether it would have been better if he had left all his property to his mother or to his younger brother or sister, or whether he should have left some to Parker or James. *That* matter was for him to determine. Neither is it for you to determine whether he acted wisely in naming Mrs. Fisher or Miss Fisher or Mrs. Brooks as legatees. *That* matter, also, was for him to determine. Neither courts nor juries are to dictate to people as to the persons to whom they shall leave their property. If the decedent was of sound and disposing mind, he had a legal right to cut off every relative and friend, and leave all to some benevolent object or even to a stranger. In this regard, the fact that his younger brother and sister are minors, makes no difference. He had the legal right to give them every dollar; he had the legal right to give them nothing; he had the legal right to give them what he has. If he had wished to provide more liberally for their support and education, he had the right to do so; he had the right to omit doing so. Heirs have no inher-

ent *right* to any property of their relative, except to that of which he dies intestate. If he sees fit to make a will, he has a right to dispose of his property in such way as to him may seem fitting.

Now, as to the proofs. The proponents have offered proof as to the general sanity and soundness of mind of the decedent. If you believe that he was in general of sound and disposing mind, then it becomes incumbent upon the contestants to show that this instrument was executed at a time when he was of *unsound* mind. It is claimed by the contestants that he was in the habit of taking laudanum, morphine, and other narcotics, and that when under their influence he was incapacitated from doing business; that he always took such narcotics whenever a disappointment or affliction came upon him; and that when the affliction of the death of his family came upon him, he resorted to the same drugs, and was by their use rendered unfit to make a will at the time this instrument was executed. That, gentlemen, is a question entirely for you to determine. You are to indulge in no *surmises* upon this matter; you are to be governed by the *proofs*, and by the conviction you receive therefrom. If you believe that he took these drugs, at the time indicated, you must go a step farther; it is not enough that he took the drugs; but you must also believe that at the time of executing this instrument he was so far under their influence as not to be of sound and disposing mind. It may or may not follow, according as you shall believe, that because he was incapacitated in 1868, or at that love affair in 1869, he was also incapacitated in 1871—of that, you are to determine.

You are at liberty to take into consideration the very paper itself here offered for probate, its provisions, the handwriting, and the manner of its execution.

A will produced by undue influence cannot stand. Undue influence is any kind of influence, either through fear, coercion, importunity, or otherwise, by which the testator is prevented from expressing his true mind. It must, of course, be an influence adequate to control the free agency of the testator. "A testator should enjoy full liberty and freedom in making his will, and possess the power to withstand all

contradiction and control. That degree, therefore, of importunity or undue influence which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act, is sufficient to invalidate it." I have a legal right to ask of a person making his will, that he direct his property to go in any given channel; I may even urge and importune him to make me the beneficiary; and if he have strength of mind sufficient to determine for himself, the will is good, even though he adopt my suggestions; but if I ask or importune a weak mind, one exhausted by disease or otherwise, to such an extent that he do not have sufficient strength of mind to determine for himself, so that the proposed script expresses *my* views and wishes rather than his own, it is not his will. If the testator had sufficient memory and intelligence to fairly and rationally comprehend the effect of what he was doing, to appreciate his relations to others, and the character and effect of the provisions of the will, and the nature of the property he wished to dispose of, and the persons to whom and the manner in which he wished to distribute it, and had sufficient force of mind to express his *own* wishes, and did so express himself, it is good. It is not necessary that he should have acted without prompting. Importunity or influence, to have the effect of invalidating a will, must be in such a degree as to take away his free agency.

The fact, if you find it to be a fact, that Mrs. Fisher was with the decedent at Galveston at the times spoken of, is not, of itself, evidence that she exercised any undue influence. Before you can *find* that she did exercise such influence, you must *believe* that she did; and that belief must be founded upon something—it must be founded upon or legitimately concluded from the testimony. You are at liberty to take into consideration all the circumstances of their being together, and of their relations, actings and doings.

It is not necessary that decedent should have signed in the presence of the witnesses, but it is necessary that the witnesses sign in the presence of each other and of the testator. You are the sole judges of the facts as to such sign-

ing. If there be no proof to the contrary, you may presume that the paper was thus signed, if you find that the handwriting of decedent and either one of two subscribing witnesses has been proved.

The fact of the assignment or transfer by Parker and James L. to Grove Adams, of any portion of their interest, for the benefit of their younger brother, you have nothing to do with. You will not take it at all into consideration. They had a legal right to make that transfer if they wished to do so—but the transfer would not at all affect the making of the will. If this script was the will of Howard Crittenden at all, it was his will long before the transfer was made; and the transfer would no more affect the validity of the will, than a subsequent conveyance of real estate, by any person, would affect the deed by which he had received the estate.

You have nothing to do with the present feelings or wishes of any of the parties to this controversy. If the decedent made a will, and if this is his will, it makes no difference now what *they* think of its provisions. The opinion of J. L. Crittenden or of Parker Crittenden as to the propriety of any provision in this script, is no more to you than the opinion of Mrs. Crittenden, and hers no more than Mrs. Fisher's. The desire of any of these parties to this controversy that either or both of the minors shall be more amply provided for, you have nothing to do with. Their views and wishes as parties are of no manner of moment, nor will they aid you in arriving at a conclusion upon any of the issues presented to you. The desire, too, of the legatees at Vicksburg are of no manner of account to you.

As to request to sign as witnesses — the request may be words or signs. It may be implied. For instance—if I am about making my will, it is a good request if I by words make the request; it is good, if the request is made for me by another, I understanding the matter and acting in accordance with the making of the request. No particular form of request is necessary. It may be implied from acts. Anything which conveys to the witnesses the idea that I desire

them to be witnesses is a good request. Even a knowing acquiescence may be equivalent to an actual request in words.

It is not necessary that there be any attesting clause, beyond the fact that the witnesses sign as such. If the witnesses simply sign their names without anything of what is known as attesting clause, it is good. The omission to state in the attesting clause that the decedent requested the witnesses to sign as such, is of itself of no consequence.

ESTATE OF J. B. BAUBICHON.

No. 8113—Nov., 1873.

DISTRIBUTION.—SUCCESSION.—FOREIGN LAW.—Unless the foreign law is made part of a contract affecting succession, it will be disregarded and the law of this State alone looked to in settling questions of inheritance.

Construing section, C. C., 1376; affirmed, 49 Cal., 18.

P. J. Robert and *H. C. Newhall*, for claimants under antenuptial contract.

E. J. Pringle, for executor.

The laws of this State furnish the rule in regard to inheritance and distribution, and the Courts here will not resort to the laws of a foreign country, unless those laws are expressed in and made a part of the marriage contract.

ESTATE OF A. H. TITCOMB.

No. 4088—Dec. 1, 1873.

MARRIAGE.—FACTS showing an actual marriage, though unaccompanied by any formal ceremony.

A *bona fide* agreement to live together as husband and wife, followed by a joint residence, a community of funds, the bringing up of children, and a holding out to the community at large of honorable relations as married people, with no touch of illicit lewdness in the lives of the parties, must be held to constitute a married status, even though there has been no formal solemnization of the contract.

Construing sections, C. C., 55–57, 68.

HOMESTEAD.—Where property claimed as homestead is worth more than \$5,000, and the widow continues to occupy it after return of inventory, she should pay rent for the use proportionally to its value in excess of the \$5,000; and the rent proportioned upon such excess in value should be charged against her in her account as administratrix.

CLAIM AGAINST INSOLVENT ESTATE.—INTEREST.—There was a mortgage claim against the estate presented and allowed, in which compound interest had been included, according to the terms of the mortgage. This claim, the widow paid without order of the Court, *in full*; it appears that the estate is insolvent.

HELD, that the widow cannot be allowed a credit for her payment for any interest over and above ten per cent., although in a foreclosure suit, the bank might have recovered the full interest.

Construing sections, C. C. P., 1474-86-1494; statute 1861-637.

Selden S. Wright, M. B. Blake, for creditors.

Geo. F. Sharp and J. C. McCeney, for widow.

Elizabeth Titcomb petitioned for a homestead to be set apart to her as the widow of deceased. Creditors of deceased resist, claiming that petitioner was not the wife and is not the widow of deceased.

The petitioner came to this State in about 1854, as Elizabeth Maguire, a single woman, and obtained employment in a laundry. While there she became acquainted with A. H. Titcomb. He proposed marriage to her, which was accepted by her; and he then proposed to furnish a house, they to reside together, and she take care of the house and rent furnished rooms to lodgers; this was accepted by her, and they entered upon those relations. The same relations continued until his death in 1870. They resided together as husband and wife; he took her to places of amusement; rode out with her; introduced her to his friends as his wife; and so far as his domestic life was known, they were regarded as married people. Three children were born to them; two died very young; the other survives, and is a young woman of about eighteen years. This child bears Mr. Titcomb's name, was spoken of by him to his friends as his daughter, and was educated by him, and christened with his consent. She appears to be a reputable young woman, and is somewhat accomplished. Mrs. Titcomb has the reputation of an honest woman. Some years ago he purchased a lot on O'Farrell street with funds earned by himself in business and by Mrs.

Titcomb in renting rooms—all the funds being used in common. He built a house upon the lot, and the family, consisting of himself, Mrs. Titcomb and the daughter, resided there together until his death; she continuing to rent furnished rooms. Mr. Titcomb has held public offices of trust in this city. No ceremony of marriage by clergyman or officer was performed.

From the foregoing facts, I am of opinion that the petitioner was the lawful wife and is the widow of deceased, and that the child was born in wedlock and is legitimate. Under the Constitution of this State, marriage is a civil contract, and may be entered into by parties, as other contracts, without the intervention of a ceremony by a third person. In the statute concerning marriages, there is no provision that any marriage not in conformity to the act shall be void. Persons competent to contract marriage may make that contract between themselves.

If a man and woman live together under a contract of marriage, not for lewdness, but for honesty, and conduct themselves honestly as husband and wife, I think that the law throws around them and their offspring the shield of marriage and legitimacy, and the only risk that is taken is the criticism which is invited from a community jealous to protect its purity.

Trumalty v. Trumalty, 3 Brad., 369;

Groetzen v. Groetzen, 3 Brad., 373.

J. C. McCeney, for administratrix.

M. B. Blake, *F. J. French* and *Steuart S. Wright*, for creditors.

The final account of Elizabeth Titcomb, administratrix, came on for settlement, exceptions having been taken by creditors to various items.

Deceased left a residence, which had been occupied by himself and family, but had not been declared a homestead. The widow made application to have the property set apart to the family as a homestead. On proceedings had on that application, the residence was appraised at eleven thousand

dollars. The Court ordered the property sold, which was done, and by order five thousand dollars of the proceeds were set apart in lieu of a homestead. After the inventory was returned, the widow continued to occupy the residence until the sale. A fair rental for the premises is ninety dollars per month. At the time of the death of decedent, he was indebted to the Odd Fellows' Savings Bank, payment being secured by mortgage on the residence, a claim for which was duly presented and allowed. This debt bore interest at the rate of one per cent. per month, compounded monthly. After the sale, the administratrix, without order of the Court, paid the debt to the Odd Fellows' Savings Bank in full, according to the terms of the note. The estate is insolvent, but a small percentage remaining to be paid to general creditors.

By the COURT: The widow was entitled to occupy the residence, as she had a right to have it, or the sum of \$5,000 out of its proceeds, set apart; but the value of its use, in excess of \$5,000, should be accounted for as assets of the estate. She should, therefore, be charged with a sum per month bearing the proportion to ninety dollars per month, which the difference between \$5,000 and the gross value bears to the gross value. She paid the full amount of the debt to the Odd Fellows' Savings Bank. Under the statute, the estate being insolvent, the interest was reduced to ten per cent. per annum. The statute provides for an order to be made upon the settlement of the final account, for the payment of the debts of the estate. If an administratrix pay a debt before the order, she takes the risk that there are funds of the estate sufficient to pay the debt, properly applicable thereto, and that the settlement of her account will display that sufficiency. It is true, that if the Bank had foreclosed, it might have recovered the full interest; but we are dealing with probate proceedings, and must be governed by the statute concerning the same. The administratrix must be charged with the difference between ten per cent. per annum and the gross amount paid for interest.

ESTATE OF HENRY RECK.

No. 4706—Dec. 22, 1873.

HOMESTEAD.—PROPERTY USED FOR OTHER PURPOSES INCLUDED IN DECLARATION, CANNOT BE SET APART BY DECREE.

Where the lot described in homestead declaration is not entirely devoted to family residence, but a portion is covered by a dwelling rented to other parties, the decree can be granted only for part used for actual residence.

COMMISSIONS OF EXECUTOR NOT ALLOWED ON HOMESTEAD.—The homestead cannot be included in the estimate of estate's value as a basis for commissions.

Construing sections, C. C., 1263; C. C. P., 1618.

George & Loughborough, for executors.

F. G. Newlands, for widow.

Testator left a widow. In his life time there was a declaration of homestead covering three dwellings and the land on which they are situated. The houses were joined together, but were occupied separately by families. Deceased and his family occupied one of the houses and tenants occupied the others. The yard in the rear of the houses was not divided by fences; there was a well in the yard which was used in common. The widow petitions that the whole be set apart as a homestead, which petition the executors resist.

The Court made a decree setting apart one of the houses, with a strip of land of the width of the house from front to rear, with the right of way to and from the well and the use of the well in common.

May 15, 1874.

The executors claim commissions on the value of the homestead set apart.

HELD: The executors are not entitled to commissions on the value of the property set apart. On the death of the husband the title vested absolutely in the wife, and the action of the Probate Court was only for the purpose of ascertaining whether there was a homestead right, and to what it attached. When the premises were set apart by the Court, that action related back to the death, and the widow held the premises relieved of all burdens by reason of administration.

The executors claim that though they may not have commissions out of the homestead property, yet they should be paid out of the remainder of the estate.

HELD: This must also be denied. Where there is a declaration before death, the property set apart under that declaration forms no basis for computation of commissions; it never formed any part of the estate of the deceased as a decedent.

ESTATE OF JOHN BEDFORD.

No. 5622—January, 1874.

SEAMAN'S ESTATE.—THE U. S. SHIPPING COMMISSIONER, under the Act of Congress creating his office (Statutes at Large, Title LIII, Chap. 3, p. 883) has a right only to take possession of such effects of a sailor, dying on a voyage to this port, as are on board ship. He cannot intermeddle with the estate or effects on shore, and is not, therefore, *ex officio* entitled to letters of administration.

Construing U. S. Statutes at Large, Title 53, Ch. 3, p. 883.

J. F. Finn, for Public Administrator.

R. W. Hent, for J. D. Stevenson.

Bedford was mate of the steamer Salinas, a sea-going vessel, and was drowned as the vessel was entering the harbor of San Francisco. The captain of the vessel delivered to J. D. Stevenson, U. S. Shipping Commissioner, all the effects Bedford had on board. He left some \$300 in a bank in this city. It was for the purpose of drawing this money that administration was applied for. The Commissioner claimed that by the act of Congress creating his office, it is made his duty to take charge of all effects of seamen dying at sea while *en route* for this port, and turn the same over to the U. S. Circuit Court, and to enable him to perform that duty he is entitled to letters. This application is resisted by the Public Administrator, who claims that letters should issue to himself.

By the COURT: The act limits the jurisdiction of the Commissioner to effects found on board the vessel. It is

not the intention, spirit or scope of the act that the Commissioner take charge of property on shore. The one relates to maritime affairs, while the other is local, of which the State has entire control.

Letters granted to the Public Administrator.

ESTATE OF THOMAS S. PAGE.

No. 4571—February 12, 1874.

CLAIM, PRESENTATION OF.—ACTION PENDING AND VERDICT HAD IN THE LIFETIME OF DECEDENT, BUT NO JUDGMENT ENTERED UNTIL AFTER HIS DEATH, WHEN THE EXECUTORS WERE SUBSTITUTED, AND APPEAL HAD AND FINAL JUDGMENT, TO BE PAID IN COURSE OF ADMINISTRATION, NO CLAIM HAVING BEEN PRESENTED.

HELD: That if the presentation of a claim had been necessary, the executors should have raised the point in the District Court; that inasmuch as they did not then raise the question, it is too late now.

Construing section, C. C. P., 1502.

Wm. Hayes, for petitioners.

W. H. Patterson, for executors.

Petitions of Welcome Fowler and John Fowler, on behalf of themselves respectively and others for an order that the executors of testator pay certain moneys.

The petitions were heard and considered together. The petition of Welcome Fowler shows that testator, Thomas S. Page, commenced a suit in the 4th District Court, May 6, 1863, against petitioner and twelve others, and that on the 29th April, 1872, upon suggestion of the death of Page, testate, F. D. Atherton, A. B. Grogan, Henry Page, C. Page, and W. Page being his executors, duly qualified, by an order of said District Court, said executors were substituted in their representative capacity as plaintiff in said action, and the action was ordered to be continued in their names as plaintiffs; that judgment was rendered, Oct. 18, 1872, in favor of the defendants for \$3,436.07, with interest thereafter at 7 per cent. per annum, and for costs, \$733; that said judgment was duly entered; that said executors appealed from said judgment to the Supreme Court, which Court, July 16, 1873,

rendered judgment remanding the cause with directions to modify the judgment by striking out the damages and inserting instead thereof, \$2,657, and by making the judgment payable in due course of administration, and affirming the judgment in all other respects. Upon filing the remittitur the District Court modified the judgment in accordance with the decision of the Supreme Court.

That said executors entered upon their trust February 5, 1872, and that they have ample funds properly applicable to pay the said amounts; and that a copy of said judgment as modified has been filed in this Court.

The petition of John Fowler shows that May 26, 1863, said Thomas S. Page commenced a suit in said 4th District Court against said John Fowler and seven others, and that on the 29th April, 1872, upon the suggestion of the death of said Page, a like order of substitution was made, and a judgment rendered October 17, 1872, in favor of the defendants for \$13,896.43, with interest thereafter at 7 per cent. per annum, and for \$392.50 costs, which judgment was duly entered; that said executors also appealed in this action, and July 16, 1873, the Supreme Court rendered its decision that said judgment be reversed and a new trial had unless within twenty days after filing remittitur defendants consent that the judgment be modified by striking out the damages and inserting in lieu thereof, \$8,989; that said defendants filed their consent, and the judgment was so modified; that a certified transcript of the judgment, so modified, has been filed in this Court; that said Atherton and others were appointed executors of the will of deceased, Thomas S. Page, February 5, 1872, and have funds in their hands properly applicable to the payment of said amounts.

Mr. Hayes offered and read in evidence certified copies of judgments, entitled: "Faxon D. Atherton, A. B. Grogan, Henry Page, Charles Page, and Wilfred Page, executors of the last will and testament of Thomas S. Page, deceased, substituted, &c., as plaintiff, vs. Welcome Fowler," and twelve others, defendants, from which it appears that said cause, on the 16th day of April, 1871, came on for trial in open court, the parties appeared by their attorneys, a jury was sworn,

witnesses were examined, and the jury rendered a verdict for defendants for \$2979.44, and that therefore it was adjudged that said Atherton and others, "executors of the last will and testament of Thomas S. Page, deceased, substituted, &c., plaintiffs, take nothing by the action" as against the defendants, and "that said defendants have and recover of and from said plaintiffs" \$3,436.07, with interest thereafter at 7 per cent. per annum, and costs \$733. It also appears that on the 22nd of August, 1873, the judgment was modified as directed by the Supreme Court.

The judgment in the other case is entitled the same, except that John Fowler and seven others are the defendants, and it appears therefrom that in open court, April 12, 1871, similar proceedings were had as in the other case, the verdict being for \$12,069.29, and the judgment being for \$13,896.43 and interest, and costs \$392.50, which judgment was recorded Oct. 17, 1872, and was modified August 22, 1873, as ordered by the Supreme Court.

It was stated by Mr. Hayes, and not denied, that the verdicts were had in the lifetime of deceased, but the judgments were not rendered thereon until after the appointment and qualification of his executors.

It was admitted by Mr. Hayes that no claims, as such, had been presented to the executors, but he claims that the judgments operate, in law, in lieu of presentation and allowance, and supersede the necessity thereof.

The judgments were rendered after the expiration of ten months from the first publication of notice to creditors.

The petitioners rested with the production of the certified copies of the judgments.

Mr. Patterson then offered in evidence the following papers in this estate:

- Petition for probate of will of T. S. Page;
- Decree admitting will to probate;
- Letters testamentary;
- Order of Feb. 6, 1872, of notice to creditors;
- Proof of publication of notice to creditors; and,
- Decree establishing the same, of Jan., 1873.

Mr. Patterson also offered in evidence the complaints' in two suits, and offered to prove that in April, 1871, in the lifetime of testator, the verdicts were rendered; that testator died Jan. 10, 1872; that thereafter his will was offered for and admitted to probate; that an order was made for publication of notice to creditors; that notice was duly published; that motions for new trial in the two suits were noticed in 1871; that April 29, 1872, orders were made by the District Court substituting the executors as plaintiffs in the two suits in place of deceased; that the motions for new trial were denied Aug. 20, 1872, and judgments were formally entered against the executors in Oct., 1874; that no claims have been presented to the executors founded either upon the verdicts or judgments.

Mr. Hayes objected to the evidence as irrelevant and immaterial, but stated that he made no question as to the correctness of the facts; and claimed that the facts offered to be shown were no defense to the application of petitioners; that under the decisions in *Patterson v. Hornblower*, 33 Cal., 278, *Coleman v. Woodworth*, 20 Cal., 568, and 42 Cal., 134, this Court was bound by the decrees of the Supreme Court in the cases, and must pay the amounts in due course of administration, whenever there were funds properly applicable.

Mr. Patterson insisted that the claims should have been presented within the ten months, and failing that, that they are barred.

By the COURT: Looking alone to the evidence offered by the petitioners, it might be gravely doubted whether they are entitled to relief at the present time, for the reason that the judgments are dated April, 1871, as if then rendered against the executors, though not entered until October, 1872, at which date (April, 1871), Page was living, and a judgment against executors would have been simply void; but the testimony offered by the executors displays the true history of the transaction—that the verdicts were rendered in April, 1871; that notice of motion for new trial was given in Page's lifetime; that after his death, the executors were substituted as plain-

tiffs in April, 1872; that the motions for new trials were denied in August, 1872, and the judgment *entered* in October, 1872.

This evidence, therefore, places the controversy upon the basis upon which it was argued by counsel, viz: Was it necessary that the petitioners should have presented their claims to the executors within the ten months?

The object of requiring presentation is, that the executors may have opportunity to examine and allow or reject, as they shall find the claim to be, or not, a debt against the decedent.

If the defendants in those suits had relied upon their verdicts, or had had judgments rendered under Sec. 202 of the Practice Act, it would have been necessary for them to present their claims.

In these cases, however, before judgment the executors were substituted as plaintiffs in place of their testator, and when the judgments were rendered, they were against them in their representative capacity. The non-presentation of a claim is, in its effect, nothing more than a matter of statement.

Where a party has once had an opportunity to interpose that objection, and fails to do so, he has waived the objection. The executors were before the Fourth District Court the moment they were substituted, in April, 1872, and until the judgment was rendered in October, 1872, and at any time during that period could have moved an arrest of judgment upon the ground of non-presentation.

Hentsch v. Porter, 10 Cal., 560; 8 How. Pr. R., 160.

If the District Court had denied that motion, they could have made that as a point on their appeal. Having omitted that course then, it is too late to raise the point now. I think, moreover, that the action of the executors in these suits was equivalent to the formal presentation, and that the amounts claimed by petitioners are debts to be paid in due course of administration, viz: whenever the executors have in their hands sufficient funds properly applicable thereto—

and such appearing to be the case here, an order may be made and entered granting the prayers of the petitions. The objection to testimony offered by the executors is overruled.

ESTATE OF J. C. BEIDEMAN.

No. 2042—May 12, 1874.

CUSTODY OF FUNDS BY ADMINISTRATOR.—An administrator is entitled to the custody of funds of the estate and may deposit them in bank to his credit; and unless it appears that he has used the funds for his own benefit, he will not be chargeable with interest, even though his accounts are not absolutely methodical.

COMMISSIONS OF ADMINISTRATOR.—Extra allowance made when the estate has been particularly laborious in management.

Construing sections, C. C. P., 1581, 1618.

S. S. Wright, for administrator.

C. T. Botts, for contestants.

By the COURT: The account of the administrator is contested, "because he has not accounted for interest on moneys of the estate which were mingled with his own funds and used for his own purposes." S. H. Parker was executor from July, 1865, till his death in March, 1866; W. R. Satterlee and J. W. Brumagim then administered until the death of Mr. Satterlee in December, 1866, since which Mr. Brumagim has been and is sole administrator. During Mr. Brumagim's sole administration he received and disbursed large sums of money. His receipts aggregate over \$600,000, and at times he had large sums in hand. He made various deposits with banking institutions, not as special deposits, but in the way of accounts, and drew against the same in various sums at various times. The amounts and dates of moneys received and paid by him do not correspond with the amounts and dates of moneys deposited with and withdrawn from the banks; it does not clearly appear that no moneys of the estate were used for purposes other than for the estate; nor does it clearly appear that the administrator has mingled the funds of the estate with his own, or that he has used them for

his own purposes. While the accounts have not been kept in such a methodical manner as that himself or any other person can give a satisfactory explanation of them in detail, yet I find nothing in them from which to question his integrity. This objection is overruled.

The administrator charges \$27,104.79 as commissions. The entire estate administered upon is \$752,570.14; the commissions upon which allowed by law are \$30,232.80. In 1868, in settling the accounts of the former administrators, \$5,626 was allowed for S. H. Parker's share, and \$5,626 for Satterlee and Brumagim. The present administrator was a party to those allowances, and he is bound thereby. He is entitled to the balance, \$18,980.80, as his share. He claims that he is entitled to extra compensation for extraordinary services. Almost the entire property of the estate was involved in litigation. That litigation was conducted by the administrator and his attorneys to a successful result, and the large sum of \$752,570.14, in money and other property, has been realized, of which \$426,985.77 has gone to devisees and legatees, and the remainder has been accounted for in the various accounts. In my opinion, at least \$200,000 has been added to the value of the estate by the manner in which the same was managed. His extraordinary services for the three years from December, 1866, were of the value of \$6,000, and he is allowed that sum.

ESTATE OF JEAN LACOSTE.

No. 3603—August 12, 1874.

ADMINISTRATOR.—Loaning funds of estate. Liable for any use of funds or parting with them to any one for any purpose other than their security.

ACCOUNT.—Funds treated as a cash item. Administrator is thereby estopped from afterwards showing that they were loaned out.

Constraining section, C. C., 2261.

A. D. Splivalo, in person.

F. E. Spencer and *M. M. Estee*, for Etcheborne, guardian of heir.

By the COURT: The item of \$16,523.20, received from J. B. Ward, has no proper place in the account of this administrator. The money was paid by J. B. Ward to the guardian of the minor heir, by the stipulation of this administrator, and never came to the possession of the latter.

Item \$11,828.80, stated in the account as "deposited with N. Larco, Esq., and lost by reason of said N. Larco having gone into bankruptcy." In May, 1870, Mr. Splivalo as administrator had a large amount of money of the estate on deposit with Belloc Freres, bankers, and loaned \$10,000 thereof to N. Larco, and in August following loaned to Larco \$1,828.80 more, making \$11,828.80, for which he took Larco's note payable to himself, in sixty days thereafter, without interest. None of this has ever been repaid. In August, 1872, Larco became bankrupt, and was so adjudged. Mr. Splivalo had the claim for this note presented as against Larco's estate. He has treated the transaction as his own individual matter until within the last few weeks. He now asks that he have credit for the amount. I do not think that this can be done. The money was not placed with Larco as with a banker in the ordinary course of business for security or deposit, but was a loan. Administrators are responsible for all loans made by them. Besides, the loss occurred before the rendition of the former account of this administrator, and in that account and the settlement thereof this money was treated as cash then in the hands of this administrator, and was so found and settled. The administrator is estopped from now claiming to be exonerated from liability for it. The item is disallowed.

ESTATE OF ELLEN DOYLE.

No. 5650—Sept. 10, 1874.

PRACTICE.—REMOVAL OF ADMINISTRATOR.—Administrator not entitled to a jury upon the question of his removal for maladministration.

An application for the removal of an administrator under Secs. 1436-8, C. C. P., is to be heard by the Court sitting without a jury, the question being one entirely within the discretion of the Judge.

Construing sections, C. C. P., 1436-8.

A. C. Searle, for administrator.

F. F. Taylor, contra.

This proceeding is under Secs. 1436-8, C. C. P., for the removal of the administrator for maladministration.

The administrator demanded a jury to try the issues, claiming that such is his right.

By the COURT: The demand is denied. The statute expressly provides that the Court shall try the issues.

ESTATE OF JOHN C. BARG.

No. 2567—November, 1874.

GUARDIAN.—ACCOUNT.—ESTOPPEL. AGREEMENT by guardian to maintain minor at his own charge as an inducement to the Court to issue letters to him. He is bound by such offer, which was embodied in the order of appointment, and cannot be reimbursed for his expenses in that regard; and such items, if entered in his account, should be disallowed.

Construing sections, C. C., 246; C. C. P., 1771.

M. B. Blake, for minor.

George & Loughborough, for guardian.

At the time of issuance of letters herein, there was a contest between William Balke, the present guardian, and one John Doscher, as to which of them should be appointed. The present guardian, in the course of the contest, answered Doscher's application, offering that in the event that he, Balke, were appointed, he would maintain and educate the ward. Letters of guardianship were thereupon issued to Balke. The Court, in its then order of appointment, recited the offer as a ground or inducement for the issuance of letters to Balke, who entered upon his duties.

Balke now asks that an account be settled, wherein he has charged the ward various items of expense for board, schooling, and clothing.

The guardian's claim for such allowances is resisted by the ward.

HELD, that the *quasi* contract implied in the offer made by Balke at the time of the issuance of letters, which, possibly, was a serious inducement to the Court to appoint him in preference to Doscher, must be held to work an estoppel against him for any claim preferred by him for reimbursement of any of the items referred to, and the more so, that such offer is embodied in the order for issuance of letters. Such items are therefore disallowed.

ESTATE OF E. F. RONDEL.

No. 4714—Nov. 30, 1874.

HOMESTEAD ALLOTTED BY DECREE OF PROBATE COURT.—MORTGAGE LIEN THEREON.

Where the Probate Court has allotted a lot of land to the widow and family of the deceased as a homestead, it loses jurisdiction of the property and can make no order looking to the subjection of the lot to the payment of a mortgage lien thereon. Such lien holder must pursue his remedy by foreclosure in the proper Court.

Construing sections, C. C. P., 1465, 1486.

L. Quint, for the widow.

R. W. Hent, for B. J. Shay.

Deceased left a widow and three minor children surviving him. Deceased and his family had for some years prior to his death occupied a house and lot as a residence, and his family have continued such occupation to the present time. The property is of the value of about \$2,500; and there is no other property except some household furniture, and a small lot on Bernal Heights valued at \$100. Deceased in his lifetime mortgaged the residence to secure his promissory note; the note came due in his lifetime, was presented to the administratrix and allowed, and the allowance has been approved. The amount now due is in excess of the value of the mortgaged premises. B. J. Shay is the assignee and present holder of the note and mortgage. No declaration of homestead was made in the lifetime of deceased. Mr. Shay commenced an action in one of the District Courts to foreclose the mortgage. The widow answered, pleading the statute of limitations in bar. That action is still pending,

awaiting the trial. Shay then made application to this Court for an order that the mortgaged premises be sold and the proceeds applied towards the payment of his debt. The widow resisted the application, on the ground of the pendency of the foreclosure suit, and applied to have the premises set apart to herself and children as a homestead. The holder of the mortgage resisted this application of the widow, upon the ground that no proceedings could be had affecting his lien, and that pending his motion for a sale, no homestead could be set apart.

The Court overruled his objections, and made a decree setting apart the premises to the widow and children as a homestead. The application for an order of sale was continued for further consideration. Afterwards, Nov. 25, 1874, the said application for order of sale came on for hearing, and said Shay urged that he had a right to the order of sale, notwithstanding the homestead order. After hearing the parties, the Court is of opinion that the family of deceased were entitled to have a homestead set apart to them out of some of the real estate of deceased fitted for the purpose (estate of Ballentine, 45 Cal., 696); that the fact of the existence of a mortgage does not take away that right; that the premises in question were the only premises belonging to the estate fitted for a homestead; that the decree setting apart the premises as a homestead did not and could not affect the lien of the mortgage so far as concerns the holder's right to foreclosure, but that the lien could be enforced only in a court having jurisdiction of foreclosure; that the decree absolutely removed the property from the assets of the estate, and from the further jurisdiction of this Court; that the statute of limitations may not have run, after the presentation of the debt, so far as concerns proceedings in this Court to enforce its payment out of other assets of the estate should any be discovered; but whether that statute will bar his remedy by foreclosure, will be for the District Court to determine. If he has permitted the statute to bar his foreclosure, he has but himself to blame.

The application for an order of sale is denied. Let an order to that effect be entered.

ESTATE OF THOMAS CRONAN.

No. 5387—Nov. 30, 1874.

GIFT INTER VIVOS.—The delivery by decedent, of a deed for which the consideration price was receivable from the agent managing the sale, and of a paper, whereby it seems that decedent's wife as donee could claim the proceeds of the sale and actually did receive them after the donor's decease, constitute a gift *inter vivos*, although the deed may not have been actually effective or the money paid in the lifetime of donor.

Construing section, C. C., 1147.

J. M. Burnett, for the widow.

J. P. Phelan, for the son.

The widow, administratrix, having filed her account for settlement, the same is contested by a son of deceased by a former marriage, upon the ground that she has omitted to charge herself with an item of \$1,000. The facts are as follows:

During the last illness of deceased, having occasion to use some money, deceased bargained the sale of a lot to one Carter for \$1,000. The deed was signed before a witness, but when delivered, does not appear; on a Saturday, he said to his wife, in substance, "You will need some money; get the \$1,000 from Carter, pay sickness and burial expenses, and keep the rest for yourself"; at the same time, he gave her a paper, but what that was, whether the deed or an order on Carter, or Carter's note, does not appear; Cronan and Carter are dead, and the woman can neither read nor write. The following day, Sunday, Cronan died. Monday morning about 10 or 11 o'clock, Mrs. Cronan went to Carter, gave him the paper and received the \$1,000, and has paid the sickness and funeral expenses, leaving some \$400 remaining to herself, which she claims to have been a gift.

The deed was recorded about 2 o'clock on that day, Monday, the acknowledgment having been proved by the witness the same day.

I think that the facts in the case justify me in finding that this money was a gift. It is true that she did not actually handle the money in the lifetime of her husband; but she did

receive from him a paper which authorized her to receive the money from Carter and upon which Carter paid the money to her. It was not the fact of receiving the money from Carter, but it was the delivery of the paper to her by her husband, which passed the ownership of the money. Let a decree be entered overruling the objections of the son, and settling the account of the administratrix.

ESTATE OF THOMAS COLLINS.

No. 6066—Sept., 1875.

WILL.—PRACTICE ON CONTEST.—THE CONTESTANT IS PLAINTIFF.

It is the duty of contestant of probate to offer proofs in support of his side of the issue before the proponent can be called upon to reply. Contestant is plaintiff; proponent, defendant.

Should contestant decline to proceed, the Court will dismiss the jury empanelled to try the issues raised and itself take proof upon all the issues directed by statute.

Construing section, C. C. P., 1312.

S. M. Wilson and J. M. Burnett, for proponent.

L. Quint and J. C. Bates, for contestant.

A paper was offered for probate as the will of deceased. A nephew files objections and contests the probate, on the grounds that deceased did not sign the paper; that the signature is a forgery; that deceased was not of sound and disposing mind.

A jury was impaneled and sworn to try the issues.

Without calling any witnesses or offering any proof, contestant claimed that the proponent must, in the first instance, prove the will, before the contestant could be called upon to offer proof. Proponent claimed that the contestant must first make out his case before the proponent could be called upon to reply to it.

By the COURT: Under the last clause of Sec. 1312, C. C. P., the contestant is plaintiff and the proponent is defendant. Under Sec. 607, the trial must proceed in the order, viz: plaintiff must produce the evidence on his part,

and *then* the defendant may offer his evidence. It may be, as suggested by counsel, that this presents the singular condition that the contestant must prove a negative. An answer is found in the statute; it is so written. The theory of this statute seems to be as follows: A paper is offered as a will; it is contested on any one or more of the statutory grounds; a jury is sworn to try the issues raised by the contest; not to pass upon any other fact. Upon *those issues*, the contestant is plaintiff. It may happen that a contest is raised as to one only of the statutory grounds, for instance, say not witnessed. That issue is the only issue before the jury, and their verdict will be conclusive upon it. But upon the rendering of the verdict upon that issue the Court could not admit the will to probate. The *Court*, not the jury, will hear evidence on all the points required by the statute not raised by the contest, and admit or reject. In this case, as to all matters involved in the issues raised by the contest, the contestant is plaintiff and must go forward.

MR. QUINT: As we respectfully differ in opinion with the Court, we will rely upon our view, and decline to offer evidence until we hear from the proponent.

MR. BURNETT: We insist that the contestant has the affirmative and must go forward.

By the COURT: In order that no misapprehension may arise, the Court announces that if the contestant shall omit to proceed with proofs, the Court will dismiss the jury, and will itself hear such evidence as may be offered by any party; in that case, however, the contestant will have lost his position as contestant.

Mr. Quint desired time for consultation with his associate, the question being an important one, which was granted. Upon the Court sitting after the recess, the contestant went forward with his proofs.

ESTATE OF MERCEDES CAMETO.

No. 6473—1875.

WILL.—REVOCATION OF PROBATE.—ATTORNEY APPOINTED BY THE COURT to represent absent or minor heirs has no right as such to institute proceeding for revocation of probate. To obtain a standing in Court, for such a purpose, a general guardian should be appointed.

NOTICE DEFECTIVE.—Where the notice on probate is defective, it is the duty of the Court on attention being called to the defect, to set aside all proceedings based on such notice.

Construing sections, C. C. P., 1303-4; 1327, 1718.

Stuart S. Wright and R. Y. Hayne, for petitioners.

G. W. Tyler, contra.

On the hearing of the application for the probate of the will of deceased, attorneys were appointed by the Court, under Sec. 1718, C. C. P., to represent certain minors interested in the estate as heirs at law, and they acted in that capacity. Subsequently, as such appointees, they filed a petition for revocation of the probate of the will, to which objection was made that they had no authority.

By the COURT: An attorney appointed by the Court under Sec. 1718, has no authority to institute proceedings for revocation of the probate of the will. He or some other person must first be appointed general guardian or guardian *ad litem* under Secs. 372-3, and then he may proceed and file the petition. Sec. 1718 authorizes the Court to appoint an attorney for minors and absentees only after some other person has instituted proceedings. The petition is dismissed.

In this case, the affidavit of publication of notice for probate of the will shows that the publication was defective. The attention of the Court having been now called to the matter, it is ordered that the order admitting the will to probate, and all subsequent proceedings, be vacated and set aside, and that proceedings for the probate of the will be commenced *de novo*, from and after the filing of the petition.

ESTATE OF JOHN McCULLOUGH.

No. 6624—Oct. 24, 1875.

WILL.—SIGNATURE to other than an olographic will should be at the foot of the instrument.

A will signed above the clause appointing executor is valid to the extent of all that precedes such signature.

Construing section, C. C., 1276.

J. M. Burnett, for proponent.

Samuel Cowles, for contestant.

The will disposes of an estate valued at some \$7,000. Deceased wrote his name at the end of that part of the paper making disposition of the estate, and before the clause appointing an executor. The subscribing witnesses signed their names at the same place. It is claimed that the whole paper is invalid as a will; the statute requires that the will shall be subscribed at the end thereof, and a clause appears after the signature, showing that the paper was not subscribed at the end.

By the COURT: The subscription by the testator at the end of the disposing part is valid. A will may be made which does not appoint an executor. The portions of the paper preceding the signature constitute a complete will, and can be admitted to probate, and an administrator with the will annexed appointed.

ESTATE OF KATIE CUNNINGHAM.

No. 6147—Feb. 10, 1875.

PRESUMPTION AS TO GIFT OF MONEYS IN BANK.—HUSBAND AND WIFE.

A declaration and instruction by a married woman to bank officer, to put her moneys to the account of "J. C. or K. C.," J. C. being her husband, and such being a customary power to the bank to pay to either, does not raise a presumption that such moneys were a gift to the husband. The instruction is a mere authority to draw, revocable by death; and the husband, as administrator, must include the account in his inventory.

Construing section, C. C., 2855.

Jas. M. Troutt, for contestants.

G. W. Tyler, for administrator.

Facts and opinion on settlement of accounts with administrator.

The deceased was, when single, Katie Brannan. She was married to John Cunningham, the present administrator, in January, 1873. At that time she had on deposit in the bank of the Hibernia Savings and Loan Society \$1,513.36 in her own name as Katie Brannan, and her bank book was in that name. This money was her separate property, acquired before marriage, except about \$250 which Cunningham had let her take, and which she had placed in her account. After the marriage she and Cunningham went to the bank, and in a conversation with the cashier she directed him to so arrange the account that either she or her husband could draw the money. The cashier thereupon wrote on the bank book and on the account in the books of the bank the words "John Cunningham or," so that the title of the account stood thus—John Cunningham or Katie Brannan. The cashier, being called as a witness, testified that when the word "and" is inserted between the names in such cases, the signatures of both parties are required before payment, but when the word "or" is inserted, the bank pays to either. After the marriage, dividends accrued and went into the account to the amount of \$161.97. Mrs. Cunningham died in October, 1873, none of the moneys having been withdrawn. Cunningham was appointed administrator, and filed a copy of his letters with the bank. He drew various sums after his appointment, and March 23, 1875, he drew the then balance, \$1,182.23. The bank officers testified that this was paid to him, not as administrator, but because the account stood "John Cunningham or Katie Brannan." In rendering his account, the administrator omitted all of this money, claiming that the facts above stated constituted a gift, and that the money was his own. The contestants claim that the money belongs to the estate and should be charged to the administrator.

From the foregoing facts the conclusions of law are that there was no gift. Mrs. Cunningham did not part with the control of the money; the transaction was simply a power to draw, which died with her. There is no evidence even of an intention to give. The administrator must be charged with the full amount, less the \$250 mentioned, and the dividend thereon, as nearly as I can estimate the proportion from the testimony, viz: \$25.

RECAPITULATION.

Amount on deposit Jan., 1873,	-	\$1513.36
Dividends,	-	161.97
		<hr/>
		\$1675.33
\$250 and its dividends,	-	275.00
		<hr/>
Balance, charge to administrator,		\$1400.33

The account is settled, charging said administrator with \$1400.33, in addition to the amounts stated in his account. Let an order be made accordingly.

ESTATE OF MARTHA L. BARKER.

No. 6744—Nov. 30, 1875.

WILL.—OLOGRAPHIC.—SIGNATURE. THE LAW IN FORCE AT TIME OF DEATH EFFECTUAL.

A will executed before the passage of the law permitting olographic wills by a testator dying during a period when such law was in force is valid, if olographic. THE SIGNATURE TO AN OLOGRAPHIC WILL need not be at the foot of the instrument. OTHERWISE, as to a will attested by witnesses.

Construing sections, C. C., 1276-7; C. C. P., 1309, 1940.

Maurice B. Blake, for proponent.

The paper offered for probate was written by deceased, dated January 1, 1870, and was not witnessed. It was written in pencil on two leaves of a memorandum book, and was not subscribed at the end. The name of the deceased appears only in the caption or commencement of the paper. Her decease occurred subsequently to the passage of the present statute relative to olographic wills.

By the COURT: Although by the law in force at the time of the execution of this paper, it was invalid as a will, witnesses being required, the law existing at the time of the death must govern, under which the execution was sufficient, witnesses to an olographic will being unnecessary. The name of the testatrix in the introduction is "signing"; it is not necessary that it be subscribed at the end. The requirement of subscription at the end applies to wills not olographic. Such paper must appear on its face to be a completed instrument, which is the case in this instance.

ESTATE OF THOMAS NEIL.

No. 4523—April 22, 1875.

WILL.—BEQUEST TO AN EXTINGUISHED ORGANIZATION. A *similar* association, organized subsequently to the vesting of a legacy by the death of testator, cannot take a bequest conditioned that if a certain organization had ceased to exist at the death of testator, the fund should be otherwise appropriated, the proposed beneficiary having become extinct.

Construing section, C. C., 1345.

W. W. Crane, Jr., for Spiritual Society.

H. E. Highton, for British Benevolent Society.

Testator bequeathed a sum of money to "The Children's Progressive Lyceum, connected with the San Francisco Association of Spiritualists," conditioned that if at the time of his death the association had ceased to exist, the legacy should go to the British Benevolent Society. At the date of the will there existed an unincorporated association or society of spiritualists and a lyceum for children connected therewith. Testator was member of both. After the will was made, and before his death, the association ceased to exist as a body, and after his death the persons who had constituted the old association incorporated under the name of The San Francisco Spiritual Union, and received the lyceum under its care.

By the COURT: By the terms of the will, the legacy to the lyceum is made to depend upon the existence at testator's

death of the association of spiritualists. That body had ceased to exist. The subsequent incorporation by the same persons of a body for similar purposes would not avail to keep the legacy alive. The right of the British Benevolent Society to the legacy had become vested before the incorporation, and could not be defeated by the subsequent action. The legacy should be distributed to the British Benevolent Society.

ESTATE OF A. MOGAN.

No. 5567—Jan. 25, 1875.

SPECIFIC DEVISES, TAXES AND ASSESSMENTS UPON.—DEVISEE SHOULD ASSUME AND PAY THEM ULTIMATELY; BUT PENDING ADMINISTRATION, EXECUTOR SHOULD PAY THEM AND BE REIMBURSED BEFORE DISTRIBUTION.

Certain parcels of real estate had been specifically devised. During administration, executor had satisfied all taxes and assessments upon the several parcels.

HELD, that the devisees should reimburse him for the outlay. In the event of their failure to do so, executor would be entitled to an order of sale of the property devised to satisfy his claim.

Construing section, C. C. P., 1669.

J. M. Burnett, for the executor.

George & Loughborough, for the devisees.

Testator made the following devises:

- 1—To Mary Mogan, a tract of land;
- 2—To Annie Kearney, Mary Kearney, and Agnes Kearney, a house and lot;
- 3—To Richard Mogan, a lot;
- 4—To Annie Kearney, a lot;
- 5—To Joseph Mogan, testator's interest in a City Hall lot;
- 6—To Richard Mullan and Patrick Mogan, testator's interest in a lot;
- 7—To John Kearney, a lot.
- 8—To Joseph Kearney, a lot.

The will directs that the money in bank in the name of Joseph and testator is to pay the last instalment on the City Hall lot; and also says:

“If my brother Joseph will pay all my debts, funeral expenses, costs and charges of administration, he shall have all my interest in the stock, trade, good will and assets of the firm of A. Mogan & Co., and I bequeath the same to him on that condition. If he will not do so, my said interest is to be sold, the bills collected, and the balance after payment of all such debts, charges and expenses, to be paid over to him. It is my intention that the real estate herein devised shall be free from any debts and charges, if my personal estate is sufficient to pay them.

Joseph Mogan is executor.

The real estate was appraised at \$13,200, the money in bank at \$1,529.71, and the partnership interest at \$795.94. There is no other estate. The executor, Joseph Mogan, elected to take under the will, and has paid the debts and the expenses of administration, which amount to more than the value of the property bequeathed to him. He has also paid taxes and street assessments which have accrued upon the real estate during administration.

Upon this state of facts, the devisees claim distribution free from the amounts paid for taxes and street assessments, while the executor claims that he should be reimbursed therefor.

Title to real estate devised passes by the will and takes effect at the death of the testator, subject only to the burden of administration; though the executor may remain in possession and collect rents; he is bound to pay taxes, and might be liable as for *devastavit* if he should not pay them.

Under this will, Joseph Mogan was bound to pay, out of the personalty, the debts of the deceased and the expenses and charges of administration. The taxes were neither. Each parcel of real estate should bear its own burden. The account should be stated in such a manner as to specify the amount paid for taxes (including the street assessment) upon each parcel, and upon the payment by the devisees respectively to the executor of the amounts so specified, the estate may be distributed according to the terms of the will. In case of refusal to pay, the executor will have his remedy by application for sale.

ESTATE OF JOHN GALVIN.

No. 5822--Feb. 8, 1875.

LOAN, FACTS SHOWING, AS DISTINGUISHED FROM A DEPOSIT. VERBAL CONTRACT TO REPAY ON DEMAND. STATUTE OF LIMITATIONS RUNS FROM DATE OF LOAN.

S. loaned decedent, in 1863, \$1,000; decedent, to keep the sum, paying S. legal interest, until demand. Decedent died in 1873. About two months before the death, S. demanded payment. A claim was allowed by widow, as administratrix, and Probate Judge. On hearing account of administratrix, the claim was contested by a creditor, as barred. S. claimed that decedent held as trustee. Claim rejected.

Construing sections, C. C., 1818, 1912; C. C. P., 312, 339; affirmed, 51 Cal., 215.

Lloyd & Newlands, for claimant.

Tully R. Wise, for creditor.

John Galvin died in December, 1873, and letters were issued to his wife. Oct. 10, 1874, James Simpson, Jr., presented to her a claim for money loaned to deceased in October, 1863. The affidavit to the claim is as follows:

"James Simpson, Jr., of lawful age, being duly sworn, deposes and says on oath: That he is a creditor of said deceased; that on or about the month of October, 1863, he loaned to and deposited with said deceased the sum of one thousand dollars in United States gold coin, which he, said deceased, was to hold and keep for affiant until such subsequent time as he, affiant, should demand the return of the same from said deceased, and agreed to pay affiant reasonable interest thereon for the use of the said money; that affiant did not demand the return of said money from said deceased until within about two months previous to the death of said deceased; that said John Galvin died on the 12th day of December, 1873; that no rate of interest on said loan was agreed upon between affiant and said deceased; that said deceased has not paid said money or any part thereof; that said deceased at the time of the demand aforesaid promised to pay to this affiant said loan, with legal interest thereon at the rate of ten per cent. per annum from October, 1863, until paid; that neither said interest nor any part thereof has been paid, and said principal sum and interest are wholly unpaid."

The claim was allowed by the administratrix and approved by the Judge. When the administratrix presented her account and report, a creditor objected to the claim of Simpson. On the hearing, it was argued on behalf of Simpson, that this was not strictly a loan, but was money held in trust by Galvin, and therefore not within the statute of limitations.

By the COURT: From an inspection of the claim and affidavit annexed thereto I am now clearly of the opinion that the money therein referred to was not deposited with Galvin in trust for Simpson, but was a loan upon interest, and that the same was barred by the statute of limitations before the death of Galvin, and that the claim was improperly allowed and approved. The exceptions are sustained.

ESTATE OF PATRICK LINEHAN.

No. 5662—Feb. 8, 1875.

SUCCESSION.—Where the decedent leaves him surviving no issue, father, mother, brother, or sister, but does leave a wife and also children of a deceased brother or sister, the wife inherits the entire estate, to the exclusion of nephews or nieces. To enable nephews and nieces to take (by right of representation), there must be a brother or sister surviving to take with them.

Where the widow in such case dies leaving children by a former marriage, such children succeed her in the estate vested in her on the death of the husband.

Construing sections, C. C., 1386, 1403.

J. F. Finn, for son and daughter of the widow of deceased by her prior marriage.

G. W. Tyler, for nephew and niece of deceased.

Deceased died intestate, leaving a widow, Ellen, but no issue, nor father, nor mother, nor brother, nor sister. The administrator is a son of a deceased brother of the deceased, and there are children of a deceased sister of the deceased. The widow, Ellen, died, leaving a son and daughter by her prior marriage.

Mr. Finn claims distribution of the entire estate to the son and daughter of the widow, under subdivision 5, Section 1386 of the Civil Code.

Mr. Tyler claims that under subdivision 2 of the same section the nephew and niece of the deceased each take one-fourth of the estate. Subdivision 2 provides that the wife takes one-half, and "if there be no father then one-half, goes in equal shares to the brothers and sisters of decedent, and to the children of any deceased brother or sister, by right of representation."

By the COURT: At first view, it would seem to be very plain that the nephew and niece would take; but subdivision 5 provides that "if the decedent leaves a surviving husband or wife and no issue, and no father, nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife."

These two provisions can be harmonized only upon the theory that the Legislature intended that in order that nephews or nieces should take (where there is a surviving husband or wife,) that there should be a brother or sister of deceased to take with them. Subdivision 4 expressly applies this theory to another state of facts, and provides, "If the decedent leaves no issue, nor husband nor wife, nor father, and no brother nor sister *is living at the time of his death*, the estate goes to his mother to the exclusion of the issue, if any, of deceased brothers and sisters."

Comparing these various subdivisions, I am of opinion that, as deceased left him surviving no issue, nor father nor mother nor brother nor sister, upon his death the entire estate vested in the wife, and upon her death passed to her son and daughter, subject to the purposes of administration of her estate.

ESTATE OF MARY WYCHE.

No. 6376—March, 1875.

GRANT OF LETTERS.—Under the law in force (March, 1875), the Court has a discretionary right to grant letters to nominee of the grandmother of an unmarried minor in preference to a mere creditor who applies.

Construing sections, C. C. P., 1365, 1379.

Winans & Belknap, J. C. Bates, for H. H. Bancroft.

J. F. Finn, for Public Administrator.

S. W. Holladay, for Mrs. Sexton.

Decedent was 17 years of age at her death, and left her grandmother, Mrs. Anna M. Bancroft, her only heir at law, residing in Portland, Oregon. The estate consists of about \$8,000, in the hands of H. H. Bancroft, who was guardian of Mary and administrator of the estate of her mother, Anna Wyche, from whom she inherited the property. Mr. Bancroft applied for letters on the ground that he is the custodian of the property, and that he is a creditor of deceased. The Public Administrator applies for letters. The grandmother opposes both applications, and nominates her daughter, Mrs. Sexton, who applies. It is claimed, for Mr. Bancroft, under Secs. 1365 and 1379, that a creditor has an absolute right to administer in preference to any appointee of any person other than husband or wife. 31 Cal., 241; 50 Barb., 340.

By the COURT: The Court has a discretion to order letters issued to the nominee of the grandmother in preference to a creditor, and that discretion is exercised.

ESTATE OF JAMES BALLENTINE.

No. 4766—Oct. 5, 1872.

HOMESTEAD SET APART TO WIDOW ALONE, THERE BEING NO MINOR CHILDREN.

The widow, all the children being adults, is entitled to have the residence set apart for her use as a homestead.

Construing sections, C. C. P., 1465, 1486, 1517, 1544, 1549-53-54, 1616-18; affirmed, 45 Cal., 696.

March 1, 1875.

SALE OF REAL ESTATE.—EMPLOYMENT OF BROKERS.—BROKERAGE.

An executor has no right to bargain with a broker to procure bids for real estate upon the condition that he shall receive of the sum bid all over a given amount, even though that given amount is a fair price for the property.

BROKERAGE IS ALLOWABLE as an expense of administration, but the amount should be passed upon by the Court.

ATTORNEY'S FEE.—Where an attorney performs services which should properly devolve upon the executor, he should look to the executor for payment out of the executor's commissions.

George Hudson, for widow.

J. B. Townsend, contra.

Testator disposed of all the estate by will. There was a house and lot upon which testator and his family had resided for years, and which the widow continues to occupy. The children are adults. No homestead was selected and declared during the life of testator. The widow applied to have the residence set apart to her as a homestead. Some of the devisees resisted on the grounds stated in 45 Cal., 697. The objections were overruled and the residence set aside.

The account of the executrix was rendered for settlement, and items were objected to. The executrix, under an order of sale, sold parcels of real estate. She employed real estate agents to aid her, under an agreement that they should have, for their services, all moneys that they could obtain above certain specified sums. She sold real estate through Madison & Burke for \$7,256, and accounted for \$6,556, leaving \$700 for the agents; and through Levy & Levitsky for \$10,950, and accounted for \$9,900, leaving \$1,050 for the agents.

By the COURT: Neither Madison & Burke nor Levy & Levitsky were purchasers; they were agents, brokers, and the amounts received by them from the purchasers were received in that capacity. An executrix has no power to make an agreement binding the estate that a broker may have as his commissions all above a named sum, even though that sum be a fair price for the property. In cases of sales requiring unusual exertions, the executor may employ a broker, but the compensation is to be fixed by the Court as expense of administration. In this case, the exertions and services of the brokers were extraordinary, they obtained excellent prices, and the allowance will be liberal. Madison & Burke are allowed \$400 instead of \$700, and Levy & Levitsky \$600 instead of \$1,050.

The attorney for the executrix claims \$1,000 for his services. Much of the labor performed by Mr. Hudson it was the duty of the executrix to have performed, for which she has her commissions. The executrix did very little besides signing deeds and papers presented to her for that purpose. \$1,000 would not be an unreasonable sum for all the labor performed by Mr. Hudson, but for that portion of it for which the executrix receives her commissions, he must look to her for remuneration. The item is allowed at \$750.

ESTATE OF GEORGE EIDENMULLER.

No. 4296—March 25, 1875.

PRESENTATION OF CLAIM.—PAYMENT OF DEBT SECURED BY PLEDGE WITHOUT ALLOWANCE.

An administrator who is willing to assume the risk that the debt will not exceed the value of the pledge may redeem the property without waiting for a claim to be presented.

Construing sections, C. C. P., 1493, 1513.

Barstow, Stetson & Houghton, for minor heirs.

Leonard Reynolds, for administrator.

Killip & Co., livery men, had a bill against deceased, for care of horses, shoeing, repairs to buggy, &c., but presented

no claim, insisting upon their lien on the property. The administrator, under an order of sale, sold the property for \$575, and paid out of that the amount of Killip & Co.'s bill, \$288.25, and returned the same in his account, which is now for settlement. The item is objected to.

Mr. HOUGHTON: The administrator could not pay the bill without its being presented as a claim. 46 Cal., 158; same, 232.

Mr. REYNOLDS: These cases are not in point; they refer to cases where the creditors are the moving parties. Stat. 1869-70, p. 723.

By the COURT: Where property is pledged by the deceased, and the creditor omits to present the debt as a claim, the administrator may pay the debt and redeem the property, and he will be protected if the property shall sell for enough to pay the debt or reimburse the estate. In making the payment he cannot deplete the estate; he takes the risk that the property will sell for or will be of the value of the amount paid. If he desires not to take such risk, he may sell subject to the lien.

The amount paid is allowed as a credit to the administrator.

ESTATE OF T. J. MILLIKEN.

No. 6140—April 5, 1875.

JURISDICTION.—RESIDENCE AS A JURISDICTIONAL REQUIREMENT. MAY BE ENQUIRED INTO BY DIRECT PROCEEDING AT ANY TIME FOR THE PURPOSE OF HEARING APPLICATION TO REVOKE LETTERS. FACTS SHOWING PLACE OF RESIDENCE.

Where application by petition has been made to this Court for letters of administration, and notice of hearing given, and letters issued, if at any subsequent time in the administration, it is made to appear that the Court had no jurisdiction by reason of non-residence of decedent, the Court will entertain a motion for discontinuance of proceedings. The fact of the giving of ten days' notice by posting of hearing on petition for administration, does not bind the Court, when a direct attack is made upon the jurisdictional right of the Court.

FACTS from which the place of residence may be determined.

Construing sections, Pol. C., 52; C. C. P., 1294.

N. G. Curtis, T. J. Clunie and J. F. Finn, for the petitioner.

J. G. Eastman and J. M. Coghlan, for administrator.

Deceased died intestate in Sacramento, October 29, 1874. C. M. Stratton filed petition for letters of administration, together with the written request of Katie P. Milliken, who claimed to be the widow of the deceased. Notice of hearing was given by posting under the statute. On the hearing no person appeared except said Katie P. and the petitioner, and after hearing their testimony, letters were granted to petitioner, the order reciting that it was "proved by the oath of Katie P. Milliken that deceased was a resident of the City and County of San Francisco," and letters were thereupon issued. Feb'y 10, 1875, Emma H. Milliken, daughter of deceased by former marriage, filed petition for revocation of the letters to Stratton, upon the grounds that deceased was at death a resident of Sacramento County, and that said Katie P. Milliken *alias* Katie P. Pearson, upon whose request letters were issued to Stratton, was a mulatto or negro, and that deceased was a white man, and that the marriage between them was null and void. Upon this petition an order to show cause was made and citation issued returnable February 23, 1875.

On that day the parties appeared by their attorneys, and Stratton demurred to the petition of Emma H. Milliken. Upon the argument of the demurrer the only point presented was that two causes of action had been improperly joined in the petition, and upon that ground, and no other, the demurrer was overruled. The administrator by leave then filed a special demurrer, and also an answer. It was agreed between counsel that, for the convenience of witnesses, proof should be taken, and thereafter the whole case, including issues of law raised by the demurrer and issues of law and fact raised by the answer, should be considered and passed upon. Proofs were accordingly taken, and the various questions of law and facts were discussed by counsel. Upon the argument four points were made, viz:

First—By the respondent, Stratton, that this Court having found, in the order appointing Stratton, that deceased was a resident of this city and county, that finding cannot now be reviewed, and the question of residence is settled so far as concerns this administration.

Second—By the petitioner, Emma H. Milliken, that the deceased was at the time of his death a resident of Sacramento county, and therefore this Court has no jurisdiction.

Third—By the petitioner, Emma H. Milliken, that Katie P. Milliken is a mulatto and the deceased was a white man, and that the alleged marriage between them was void, under Sec. 60, of the Civil Code, and that she had no authority to either nominate an administrator or to have letters to herself.

Fourth—By the respondent, Stratton, that Sec. 60, of the Civil Code, is in violation of the 14th Amendment to the Constitution of the U. S., and is void.

It was agreed between counsel for the respective parties, that if this Court should be of opinion that the question of residence could now be inquired into, and should find from the evidence that deceased was a resident of Sacramento, the order proper to be made would be an order discontinuing the proceedings in this Court and dismissing the same; and that the question of validity of the marriage would not be for present decision; but if this Court should retain the proceedings, the validity of the marriage and the force and effect of Sec. 60, would be passed upon.

By the COURT: As to the first point, that the question of residence cannot now be inquired into; I have read all the cases cited by respondent; and I find them to be uniform that the question of residence cannot be raised by *collateral* attack, that is, by questioning, in another Court, the correctness of the finding of this Court. But this proceeding is not a collateral attack; it is a direct attack. I am not referred to any case holding that a direct attack cannot be made. In 28 Vermont, 667, cited by respondent, it is held that the order of the Probate Court can be questioned *only* by some

direct proceeding; and in 14 Gratt., 236, it is held that the order is voidable on citation or appeal.

In the case at bar, the notice of hearing application for letters was by ten days posting in this city and county, and the only witness examined as to residence was Katie P. Milliken. If it were true that after such hearing the question of residence could never again be raised, except by appeal, it would of course result, that upon the death of any citizen of this city and county, no matter how well known at home, any person could go to San Diego or any distant county, petition for letters, give ten days notice by posting, make oath that the deceased resided in that county, take his letters, and thereby prevent the possibility of the subject being inquired into again in that Court. This objection by respondent is overruled.

Second—As to the place of residence of deceased at the time of his death. From 1853 deceased had been a resident of Sacramento city and county; was a merchant, member of the firm of Milliken Bros.; the firm carried on quite an extensive business, and had considerable property in that city; deceased gave his personal attention and attendance to the business; he had a family, consisting of a wife and several children, who with himself occupied the family residence on 16th and H. streets. Prior to October, 1873, he formed illicit relations with the petitioner, Kate P., also a resident of Sacramento, and in October, 1873, his wife obtained a divorce from him. At some time prior to the divorce he took rooms and board at the Golden Eagle Hotel in Sacramento. He remained at that hotel until April, 1874; portions of the time Katie P. was at the hotel, with him, and he was occasionally away for a few days at a time. In January, 1874, he was married to Katie, and he took rooms in San Francisco which were occupied from that time on by Katie, except when she made occasional visits to him at Sacramento, and by himself when he made occasional visits to her in San Francisco. In April, 1874, he removed to the International Hotel in Sacramento, and occupied rooms there until July 23, 1874, from which date until Aug. 13, 1874, he boarded at another hotel in Sacramento. Aug. 13

he returned to the International Hotel and occupied his rooms there thence until his death, Oct. 29, 1874. He had continued to make occasional visits of a few days to Katie in San Francisco, and she visited him in Sacramento. In August and September he made a trip to the mountains for his health, and after his return he was confined to his room by his last illness for about ten days. He was constant in his attendance at the store of Milliken Bros. previous to his last illness, except when temporarily absent from the city as above stated.

He had relatives, friends and business acquaintances in Sacramento, none of whom, so far as appears, had any information of any intended change of residence. He told Katie and persons of whom they had rooms in San Francisco that he intended to reside in that city, but it does not appear that he had carried that intention into effect. Indeed, in my opinion those declarations were made more to conciliate Katie, in regard to whom he labored under much social criticism in Sacramento, and who found her residence there to be unpleasant, than to indicate any real intention upon his part.

I find as facts that deceased was a resident of the city and county of Sacramento from 1853 continuously until his death, and that at the time of his death he was a resident of that city. It therefore follows that this Court has no jurisdiction to continue the administration of his estate; and under the agreement of counsel hereinbefore noted the proceedings for administration should be discontinued.

ESTATE OF M. S. WEBB.

No. 4698—April 19, 1875.

INSURANCE POLICY, PROCEEDS OF.—COMMON OR SEPARATE ESTATE.

Where the first third of the amount of the premiums was paid by decedent out of his earnings before marriage and the remainder out of his earnings received subsequently to marriage, the Court must decide that one-third of the fund was decedent's separate estate and the remainder community property.

Construing sections, C. C., 163-4.

Lloyd Baldwin, for the widow.

Geo. W. Tyler, for the father.

In December, 1869, M. S. Webb obtained from the North American Life Insurance Company an endowment life policy for \$4000, payable to himself in fifteen years, or to his personal representatives upon his earlier death, and paid the first year's premium, \$269.84. May 12, 1870, he married. In December, 1870, he paid the second yearly premium, and within six months thereafter paid a half-yearly premium, and died April 15, 1872, intestate. His administrator paid the last half of the third yearly payment, and collected the amount of the policy.

Deceased left a wife and father. The wife claims the entire proceeds of the policy to be common property, and the father claims the same to be separate property.

By the COURT: The consideration upon which the insurance company promised to pay the policy, was the payment of the yearly premiums. Those premiums were paid, one-third out of the separate property and two-thirds out of the common property. It legitimately follows that the proceeds of the policy belong to the respective funds from which the payments were made, viz: one-third to the separate property, and two-thirds to the common property.

Decree of distribution accordingly.

ESTATE OF JOHN McDONNIEL.

No. 4181—Aug. 16, 1875.

DEVISE.—Interpretation of phrase, “issue of her body,” etc., as applied to first beneficiary to be deemed as creating an estate in fee in her only when such is the evident intention of testator.

SHELLEY'S CASE, rule in; “issue” not synonymous with “heirs” within the rule of *Norris vs. Hensley*, 27 Cal., 489.

Construing sections, C. C., 1329, 1334.

J. M. Burnett, for executor.

D. Rogers, contra.

The will of the testator contains the following provisions:

First—To my daughter, Hannah Hubbard, wife of, &c., I devise and bequeath the land upon which she now lives, to have the use, rents, issues and profits thereof, during the term of her natural life, but without power of selling the said land. Should she die leaving her surviving any issue of her body, then and in that case the said land on her death shall go to such issue, to be divided share and share alike.

Second—The property in this city and county on Howard Court known as No. Twenty Howard Court, I devise and bequeath to my wife Bridget McDonniel, to have the use, rents, issues and profits thereof during the term of her natural life, but without the power of selling said property. Should she die leaving her surviving any of our children, then and in that case, said property shall go on her death to such child or children. Should none of our children be alive at her death, said property shall go to my daughter Hannah and her children.

Under the first clause, Mrs. Latham asks for distribution to herself in fee. She has a deed of the property to herself from Mrs. Hannah Hubbard, and from the widow and children of testator. It is admitted that Mrs. Hubbard, who is a daughter of testator by a former marriage, has children; and that Mrs. McDonniel has children by the testator. Mrs. Latham claims that under the will Mrs. Hubbard took the estate in fee, the words “issue of her body” and “such

issue" being equivalent to the word "heirs," within the meaning of the decision in *Norris vs. Hensley*, 27 Cal., 439.

In opposition, it is claimed that Mrs. Hubbard took but a life estate, remainder over to such issue of her body as should survive her; and failing such issue, remainder to the heirs of testator.

The executor desires information and instruction as to the distribution of the property referred to in the second clause of the will.

By the COURT: I find the law upon this subject very clearly laid down in 2 Washburn on Real Property, pp. 270-4; in O'Hara on Interpretation of Wills, 4 Kent, 273; and 2 Redfield.

Where the estate was limited to the wife for life, remainder to the heirs of the bodies of the husband and wife, the freehold being in the wife alone, the limitation over would be a remainder, and their heirs would take as purchasers. Where the limitation of the remainder is to a son or sons, or to children or issue, the persons thus designated take as purchasers, and do not come within the rule in Shelley's case. The words "child or children" are, in their usual sense, words of purchase, and are always so regarded, unless the testator has unmistakably used them as descriptive of the extent of the estate given, and not to designate the donees. A question arose in New Jersey, in relation to a grant to A. for life, and at her death to her children. The Court of Errors decided it to be a life estate only in the first taker. "Issue" in a will is either a word of purchase or inheritance, as will best answer the intention of the testator; in a deed it is always taken as a word of purchase. In the case at bar, it seems to be clear and unequivocal, who were to take after the life estate. In the first clause, the words "issue of her body" clearly indicate that those who came from her body and who should be living at her death, and those only, are to take; and if she were to die without issue, her heirs were not intended to have the estate, but the estate would revert to the heirs of the testator. The testator used express words of distribution, "share and share

alike," which aid in ascertaining his intention. In the statute of this State concerning descents and distributions, in force when the testator died, the word issue is repeatedly used as equivalent to children. At the time the will was made, Mrs. Hubbard had children then living. The words of the will do not purport to embrace issue *ad infinitum*, but such only as should be in existence at Mrs. Hubbard's death. Mrs. H.'s issue then living are to take as purchasers; after-born issue would have no interest in the will. I do not think that this case is within the rule decided in *Norris vs. Hensley*, but that the testator designated persons standing in a certain relationship with Mrs. Hubbard who are to take, not as her heirs, but by purchase.

The general current of authorities seems to be that while the rule in *Shelley's* case is inflexible, whenever the words used indicate that those who are named to take the after estate, take it as heirs, yet, as the rule is contrary to the evident intention of the testator, it will be applied only where it must be.

The property should be distributed to Mrs. Latham during the life of Mrs. Hubbard, and upon the death of Mrs. Hubbard leaving issue of her body her surviving, to such issue in fee; and in case of the death of Mrs. Hubbard leaving no issue of her body her surviving, to Mrs. Latham in fee.

The property mentioned in the second clause of the will should be distributed, a life estate to Mrs. McDonniel, with remainder in fee to such of the children of herself and the testator, if any, as shall survive, and with a conditional remainder in fee to Mrs. Hubbard and her then surviving children if no children of Mr. and Mrs. McDonniel shall survive Mrs. McDonniel.

Decree accordingly.

ESTATE AND GUARDIANSHIP OF E. A. G. C. TITTEL.

No. 4697—Aug. 17, 1875.

JURISDICTION OF PETITION FOR LETTERS.—RESIDENCE.

Application for letters of guardianship should be made in the county where the proposed ward resides.

Construing sections, Pol. C., 52; C. C. P., 1294, 1747, 1763.

W. H. L. Barnes, for petitioner.

McAllister and Loughborough, for respondent.

This is an application of F. G. E. Tittel to be appointed guardian of the estate of his brother, an alleged incompetent person. It appears that the person of whom guardianship is sought is a resident of Santa Clara County.

By the COURT: The application should have been made in Santa Clara County, the place of residence. This Court has no jurisdiction of the case. The petition is dismissed.

ESTATE OF J. W. STOW.

No. 5974—November, 1875.

GROUNDS FOR REVOCATION OF LETTERS.—WHAT IS MALADMINISTRATION.

It is no ground for revocation of letters that executors have not filed accounts. The law is merely directory upon the subject; and there may be good reasons why the executor should withhold his accounts for a time.

It is no ground for revocation, that debts appraised as valueless are uncollected. It is not the duty of an executor to pursue an insolvent endorser at the expense of the estate—especially, if the endorser is a corporation not apparently organized for the purpose of guarantee on notes. Such failure to litigate a doubtful claim is not ground for revocation of letters.

Executors have no right to pay assessments upon stock shares unless they are willing to assume the risk of the shares being worth the assessment. Creditors or heirs may support the executor in so doing; but if he has not such guaranty, his course should be to sell the stock, if it can be sold, as perishable.

These are all matters to be heard on settlement of his accounts. An executor may err in judgment. That in itself is no ground for holding him liable.

Construing sections, C. C. P., 1522, 1628.

Hamilton and Heath, for widow.

Edw. J. Pringle and S. M. Wilson, for executors.

This is an application for revocation of the letters, for alleged maladministration and failing to file accounts at the time required by law.

By the COURT: I find no grounds for removing the executors. It is true they did not make a final report at the time required by law, but when called upon by applicant they reported to her the condition of the estate as far as they could. Debts are uncollected, which were appraised as valueless; and it does not now appear that they could have been collected. The executors had the fag-ends of disastrous business adventures from which to weave together affairs in order to pay the creditors and save something for the heirs; but the estate is largely insolvent. One point was made, that a note had been endorsed by a corporation, and that the executors should have pursued that corporation—an insolvent—and because they did not do so they should be removed. There is no proof that the corporation was organized to indorse notes. Deceased left shares of stock in incorporated companies, which have been assessed, and have been sold to pay the assessments, no excess being realized.

By the neglect of the executors to pay the assessments they were not guilty of maladministration. If an executor pays an assessment he takes the risk that the stock will reimburse the estate for the payment. He cannot deplete an estate in paying assessments; as the old adage is, he must not send good money after bad. It was urged that executors have no right to make such payments without an order of the Court. The Court has no power to make such an order. If application were made for an order to pay an assessment, it would be refused; there is no law for granting it. If an executor lets stock be sold for an assessment he takes the risk that it is then worth more than the assessment; if he pays the assessment he takes the risk of being reimbursed by a subsequent sale. I am aware that this would place an executor in an unpleasant position; perhaps the wisest course would be to place the stock in the market and sell it as perishable. If creditors and heirs see fit to take the risks of the rise and fall of stocks, they may do so; but executors

are not obliged to do it. An executor should be removed on some ground of delinquency; not on the ground of error of judgment merely. I am not aware that these executors have committed an error of judgment; if they have, to an extent to hold them responsible, this is not the time to charge them; but when their accounts come on for settlement the accounts can be surcharged if a proper case be made.

Application denied.

ESTATE OF LOUIS IMHAUS.

No. 6338—April 6, 1876.

WITNESS.—DISCOVERY.—Examination of a witness in Probate Court under Sec. 1459, C. C. P., to discover property of estate.

Sec. 1459, C. C. P., is intended to aid in the discovery of matters and transactions between the witness and decedent in the lifetime of the latter so that the administrator may, as to his knowledge in the premises, stand on equal terms with the witness. The section in question does not apply to transactions occurring after the death.

Construing section, C. C. P., 1459.

Geo. L. Woods & L. J. Hardy, for administrator.

Jarboe & Harrison, for widow.

This is a proceeding under Sec. 1459, C. C. P., to examine the widow of deceased. The petition of the administrator alleges that the widow has since the death of deceased received rents of the property of the estate, which she refuses to account for.

The widow objects, that Sec. 1459 relates to transactions occurring before the death of the deceased, and not to rents accruing during the administration.

By the COURT: The objection is sustained. The section is intended to discover matters occurring prior to the death, of which the administrator is ignorant, to the end that he may stand on equal terms with the party proceeded against. Matters occurring during the administration are or should be known to him.

ESTATE OF JOHN SIME.

No. 4459—Oct. 11, 1876.

GARNISHMENT PROCESS SERVED ON EXECUTOR.—The executor is not subject to garnishment process for the share of heir who has been sued for a debt; nor can the heir's interest be reached by process of garnishment before distribution.

Construing sections, C. C. P., 717-18-19, 1666.

George & Loughborough, for creditor.*J. H. Smythe*, for Mrs. Sime.

The estate is ready for distribution. A creditor of Mrs. Sime has served upon the executor a garnishment of the interest of Mrs. Sime in the property of the estate, and moves that the executor be ordered to pay his debt out of the moneys now ready to be distributed and paid to her.

By the COURT: Money in the hands of an executor cannot be reached by the process of garnishment before distribution. Estate of Nerac, 35 Cal., 392. Motion denied.

ESTATE OF GEORGE L. HOWE.

No. 6894—April 12, 1876.

MERETRICIOUS RELATIONS RAISE NO PRESUMPTION OF A MARRIAGE, even where, for some temporary object or convenience, the parties assume to third parties the relation of husband and wife. Where a man's mistress is occasionally called by his name or purchases articles, with his knowledge as his wife, that, of itself, raises no presumption of an honorable connection, especially where, in other legal relations, the woman holds herself out as a *feme sole*.

Construing sections, C. C., 55; C. C. P., 1963.

E. D. Sawyer, for mother.*A. C. Searle*, for alleged wife.

There are two applications for letters of administration: one by Mrs. Howe, the mother of deceased; and the other by Luisa, claiming to be the wife of deceased.

FACTS.

The claimant Luisa was Luisa Sanchez; she married one Miramontes, from whom she was afterwards divorced. After the divorce, she became acquainted, in the fall of 1867, with George L. Howe, then single. They frequently met for illicit purposes, at houses of ill-fame, and after a time he hired a room in a building at the corner of Montgomery and California streets, in this city, and they occupied it together as a lodging; they retained that room for some time, then removed to another, and so made various changes, continuing to rent rooms until his death in January, 1876. There was no ceremony of marriage between them, nor did he ever promise to marry her.

He had a mother, brothers and sister residing in this city and county, and prior to the commencement of his relations with Luisa he had resided with his mother, boarding and lodging at her house. After the commencement of his relations with Luisa he continued to board and lodge at his mother's house, but not regularly as before—he became quite irregular in his habits; he had no permanent lodging and boarding place; sometimes he lodged and took meals at his mother's; sometimes he lodged at his store, and sometimes at the rooms occupied by Luisa, and took meals with her at restaurants. At the various places where they roomed together they were known as Mr. and Mrs. Howe; he spoke of her there as his wife; also at the restaurants; they were seen together several times on the street; and he took her two or three times to picnics. She made some purchases of articles of female apparel, of shopkeepers, in the name of Mrs. Howe, and he paid the bills; indeed, he supported her, and was with her whenever he desired. On some occasions, when he did not happen to be with her, she received visits from other men for illicit purposes, in consequence of which, on one occasion, she was compelled to remove from rooms then occupied by her. Among some of her friends they were known as Mr. and Mrs. Howe, but among his family and friends none had any idea that he was a married man; those who knew of his having relations with Luisa, supposed that the relations were those of man and mistress.

On the 4th of September, 1872, she, as Luisa Sanchez, executed a power of attorney to Geo. L. Howe; Dec. 29, 1873, she, as Luisa Sanchez, executed a deed of real estate to one Luco; she was also, in 1873, and 1874, as Luisa Miramontes, party to a suit in Fourth Judicial District Court for partition of some real estate owned by herself and some of her relatives; she also signed other papers, deeds and receipts, sometimes as Luisa Sanchez, sometimes as Luisa Miramontes. In none of these business transactions relating to her own property did Mr. Howe join her, although she sometimes advised with him as a friend.

Their relations were, from the commencement to the end, of a meretricious character.

CONCLUSION OF LAW.

From the foregoing facts, the conclusion of law is that the petitioner, Luisa, was not the wife and is not the widow of the deceased.

Marriage will be presumed, where a man and woman live together as husband and wife, not for lust, but for honesty, and hold each other out to the world as such; but, as has been cogently remarked by the Judge of a sister Court, "If the cohabitation is shown to be meretricious, it furnishes no presumption of marriage, nor does an acknowledgment that they are man and wife furnish evidence of the marital relation; if made casually and to accomplish a temporary purpose."

The petition of Luisa for letters of administration is denied, and the petition of Mrs. Howe, mother of deceased, is granted. Let a decree be entered accordingly.

ESTATE OF H. M. WHITMORE.

No. 3750—Dec. 6, 1875.

CLAIM, ALLOWANCE OF.—*When res adjudicata.*—FACTS SHOWING THAT THERE HAS BEEN NO absolute adjudication UPON a claim.

A claim for indebtedness to be paid out of the estate only when certain primary sources of payment had been exhausted was conditionally allowed by one of two executors (the other being absent from the State) but not by the Probate Judge, until after the settlement of first annual account, wherein the facts of such allowance were recited. Another annual account was settled, in which nothing appears touching the claim; and also a hearing of an application to sell real estate, which was granted, (there being indebtedness, even excluding the claim, to warrant such sale); and in the order, the right was reserved to the heirs to contest the claim.

HELD, on application by heirs in that behalf, that none of the proceedings recited above were a bar to their contesting the claim.

Construing sections, C. C. P., 1636, 1657, 1647.

July 14, 1876.

CONTRACT TO CUT TIMBER FROM PUBLIC LAND, the title to which is pending in the U. S. Courts, the Commission having confirmed title to the claimants, under a grant, which confirmation has been reversed in the District Court, and an appeal therefrom taken, but subsequently dismissed.

SUCH CONTRACT HELD TO BE LEGAL and a claim thereunder allowable.

INTERPRETATION OF CLAUSES IN CONTRACT fixing the period for which the duties of each party thereunder are to continue.

Construing sections, C. C. P., 1493, 1650; U. S. statutes, p. 1049, Sec. 5388.

Cowles & Drown, for executors.

Douthitt & McGraw, for devisees.

G. A. Nourse, J. B. Southard, for creditor.

Letters testamentary were granted to E. F. Northam and E. P. Whitmore, and they respectively qualified and received letters, viz: Northam April 5, 1870, and Whitmore May 11, 1870, which letters still remain in force.

Notice to creditors was given by Northam, the first publication being April 18, 1870.

February 16, 1871, L. E. White presented to executor Whitmore his claim of \$31,806.00 and accruing interest, and thereafter said Whitmore endorsed his allowance thereon in the following words, viz:

"The within and foregoing claim presented on the 16th day of February, A. D. 1871, is hereby approved and allowed for whatever balance of the amount thereof (\$31,806.00) may remain due, after the exhaustion by said claimant and the other creditors of the 'Garcia Flume and Mill Company,' and of the firm of Whitmore & Stevens, of the partnership assets of said company and said firm, and after the application to said claim of whatever *pro rata* of said partnership assets may be coming to the same on the settlement of the affairs of said company or firm, and the distribution of the assets thereof. San Francisco, February 27, 1871.

"E. P. WHITMORE,

"Executor of the estate of H. M. Whitmore, deceased."

The allowance was approved by the Probate Judge Aug. 21, 1871, and the claim filed by the Clerk the same day.

July 24, 1871, executor Northam filed a report and account, called "First annual account and report," executor Whitmore being then absent from the State. Accompanying the account was a list of claims allowed; the reference to the claim of L. E. White being in the following words:

"The claim of L. E. White is allowed by E. P. Whitmore, executor, for the amount that may remain due thereon after the exhaustion of the partnership assets of the Garcia Flume and Mill Co., but not yet approved by the Probate Judge."

After due notice by posting, the account was settled Aug. 14, 1871, on which day a decree of settlement was made. No person appeared except the executor, there was no contest, and the decree does not in terms in any way refer to the claim of White.

It will be observed that this settlement was *before* the claim had been approved by the Probate Judge.

April 8, 1874, both executors filed their report and account, called "Second annual account of Executors." Accompanying this account was a list of claims not included in the previous report; no reference is made to the claim of White. This account was settled April 27, 1874, after notice by posting. Wm. Royal, attorney appointed by the

Court to represent certain absentees, consented to the settlement of the account.

December 21, 1874, the executors presented a petition for the sale of real estate; and in giving lists of debts of the estate, under the head of "Contingent, Doubtful, and Litigated Debts, &c.," the executors refer to the claim of White as follows: "The claim of L. E. White, assignee of judgment recovered in the 7th District Court (Mendocino Co.) in the action C. P. Clark *et al. vs.* Russel Stevens, was allowed by E. P. Whitmore, one of the undersigned executors, for whatever balance of the amount," &c., quoting the words of the allowance above given, and adding:

"The amount of the said claim was \$31,806. This claim was filed in said Probate Court August 20, 1871. The total amount of said claim remains unpaid after the exhaustion of said assets referred to in said allowance."

The petition for sale came in for hearing January 20, 1875; the executors appeared in person and by attorney; Edwin P. Whitmore, Hamlin Whitmore, and Henry S. Whitmore, heirs and devisees of said deceased, Maria H. Whitmore, widow of Joseph F. Whitmore, a deceased heir and devisee of said H. M. Whitmore deceased, Lucia E. Whitmore and Mary J. King, the children of said Joseph F. Whitmore, and Osman L. King, husband of said Mary J. King, all appearing herein by their counsel, Messrs. Douthitt & McGraw, and filing their petition herein, representing that they do not contest said application for sale, but, on the contrary, assent to such sale for the purpose of paying all allowed claims against said estate except the allowed claim of L. E. White for \$31,806, and that it is their intention to contest said claim as fraudulent and illegal, and praying that if it should appear that a sale of the real estate is necessary, the right might be reserved to them to contest said claim of L. E. White, and that they be allowed thirty days from said day in which to file and serve on said White the necessary petition and application for contesting said claim.

The said White appeared in person and by attorney and objected to any order being made giving said heirs and de-

visees time to contest said claim, and objected to their contesting said claim. It was admitted by all parties that a sale of the real estate was necessary to pay the debts, even if said claim of White were not considered.

After hearing all parties, the Court made a decree directing the sale of the real estate, and ordering, on motion of Messrs. Douthitt & McGraw, on behalf of said persons for whom they appear as counsel as aforesaid, that the right to contest said claim of the said L. E. White be reserved to said persons, and to each of them, and that they have thirty days in which to file and serve on said L. E. White the necessary petition and application for contesting said claim.

Subsequently, the said White moved to strike from said decree the clause giving to said persons time to contest said claim, which motion was overruled by the Court.

February 20, 1875, said heirs and devisees, by Messrs. Douthitt & McGraw, filed their petition for the rejection of said claim of L. E. White, and duly served the same the same day.

April 19, 1875, said L. E. White filed his petition, showing the allowance and approval of his claim as above stated, that it had not been paid, and that the executors had sufficient funds in hand for the purpose, and asking that an order be made for its payment. An order to show cause was made and served.

April 28, 1875, the executors made answer that they had not paid the claim because the same was contested by the heirs and devisees hereinbefore named. The said heirs and devisees asked leave to file their answer and intervention, objecting to said claim, praying that the same be disallowed and rejected in whole or in part as should seem just, and alleged as grounds of such rejection certain matters set forth in said answer.

On the 24th of March, 1875, the said executors filed their third annual account, in which they say that the claim of said White has not been paid, "which is contested by the heirs of said deceased."

This account was settled April 6, 1875. Afterwards, in July, 1875, (the hearing having been postponed from time to

time,) the said petition of L. E. White for the payment of his claim came on to be heard, Messrs. Nourse and Southard appeared for said White; Messrs. Douthitt & McGraw appeared for said heirs and devisees, and A. N. Drown, for the executors.

The claimant moved for an order for the payment of his claim, and referred to the first account and to the claim to show that it is an allowed claim, and to the second account, that there remains nothing of the partnership assets, and to the orders settling the accounts, and the proceedings on the sale of real estate.

The said heirs and devisees then offered to file their objections to the payment.

The said White objected to the filing, on the grounds:

1—The heirs and devisees have had their day to object to the claim and its allowance, first, on the settlement of the first annual account; second, on the application for the sale of real estate; and they are now barred.

2—The petition does not state facts sufficient to show them entitled to any relief.

Attorneys for said claimant agreed that under our statute the settlement of the account was conclusive upon the allowance of this claim; that the claim was then passed upon, necessarily, without any specific objection or adjudication; that even if these heirs could have been heard upon the sale of real estate, they should have made their objection then, and the Court could not give them time.

The matter was argued and submitted and taken under advisement.

By the COURT: The Court is of opinion that the said heirs and devisees are not barred from contesting the said claim and its allowance, for the following reasons:

First—Every claim must be allowed by the executors and approved by the Probate Judge *before* it can be ranked among the acknowledged debts. The approval of the Judge is as much a part of its allowance as is the act of the executors. If the Judge had rejected it, it would not be a debt until suit brought and judgment obtained. At the time that

the first annual account was returned, as well as when settled, this claim had *not* been approved by the Judge. It had been allowed by one executor, doubtless acting for both, but it was not yet a debt to be ranked as such. Even if this claim and its allowance became in any sense a finality by the settlement of that account, it became such only to the extent that it had been allowed by the executors. The heirs and devisees were not called upon to contest the claim until it had been approved by the Judge. Besides, at the time the first annual account was rendered and when settled, this claim of White was not filed, and there was nothing of record to show the nature of the claim. The knowledge by E. P. Whitmore of its value would not bind the other heirs and devisees.

The settlement of the second account was not an adjudication upon this claim; the account made no reference to it.

Second—The decree for the sale of real estate was not an adjudication upon the claim. Upon the hearing of the petition for sale, the heirs and devisees appeared and filed objections to the claim. They did not oppose the sale; it was admitted by all parties that a sale was necessary, even not considering the claim of White; and such sale being necessary, it was not required to postpone all other proceedings in the estate to await a controversy which would effect only the claimant and the heirs and devisees.

The Court did not assume to then pass upon the claim, but expressly reserved the question, and gave to the devisees and heirs time to bring forward their objections.

Third—The Code in terms gives to heirs and devisees three periods at either of which they may appear and contest an allowed claim, viz:

- 1—Upon rendering the third term exhibit;
- 2—Upon the settlement of any account;
- 3—Upon hearing a petition for sale of real estate.

Sec. 1636 provides that upon the settlement of any account, "all matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be con-

tested by the heirs, for cause shown." Sec. 1637 provides that "the settlement of the account and allowance thereof by the Court, or upon appeal, is conclusive against all persons," &c. And Sec. 1647 provides that upon the settlement of the accounts of the executor and administrator at the end of the year, the Court must make an order for the payment of the debts.

It was urged by counsel for White that the heirs and devisees are limited to these periods, and can be heard at no other; and that if a claim be allowed and reported in any account, the heir must then contest the claim, and the settlement of the account is conclusive upon the claim, and the contest can never after be heard. On the other hand, it was urged that a claim is not passed upon merely by the settlement of the account; that the words "*passed upon*" mean actually heard and adjudicated; that unless a claim has been actually *passed upon*, the heirs may object upon the application of the claimant for payment, even though the statute does not mention that as one of the periods for objecting.

Whenever any claimant makes application for the payment of his claim, it must necessarily be that any person whose interests would be effected thereby has the right to contest such payment, unless such right is absolutely barred by statute. Even granting that the settlement of an account is conclusive as to all claims therein reported as allowed, we have seen that this claim was not an approved claim when reported, and could not have then been passed upon as an approved claim. The statute regarding sale of real estate does not in terms make the decree of sale conclusive to the same extent as the decree of settlement of an account; it may be doubted if it be conclusive in any respect other than as to the propriety of a sale.

It is the opinion of the Court that this claim has not been "*passed upon*" within the meaning of the statute.

The above point, as to the right of the heirs and devisees to be heard, was the principal point urged. The other point, that the petition does not state sufficient facts, was not so thoroughly considered. The claimant can demur

after the objections are filed, and so have that point fully considered.

It is ordered that said heirs and devisees have leave to file their objections to the payment of said claim.

July 14, 1876.

Proceedings upon motion of L. E. White that his claim be paid:

FACTS AND CONCLUSIONS.

The heirs at law present reasons why the claim should not be paid, viz:

1—The contract was against the policy of the law, and is void, it being a contract to cut timber upon public land of the United States;

2—Whitmore & Stevens had the right to terminate the contract when they pleased, and were to be in no case responsible for any injury Schwend & Clark might thereafter sustain or expenses they might incur.

1—As to the first point:

FACTS:

The timber referred to in the contract was growing upon land covered by an alleged Mexican grant. The claim was presented to the Land Commission for confirmation, March 16, 1852, and was confirmed, Nov. 6, 1855. Feb'y 15, 1856, the transcript was filed in the District Court of the U. S., and June 19, 1866, a decree was entered rejecting the claim. Dec. 3, 1867, an order was made granting an appeal to the U. S. Supreme Court. Oct. 4, 1872, motion to vacate decree was dismissed; and Jan. 6, 1873, mandate of Supreme Court filed, dismissing appeal.

The contract was made May 14, 1869, and was to run four years from May 24, 1869; and the timber to be cut was for private purposes, for removal.

The only title which Whitmore & Stevens had to the land bearing the timber was derived by mesne conveyances from the grantees of the above mentioned grant; and other than as affected by the grant, the land was public land of the

United States, Clark & Schwend had no knowledge or information as to the title, other than as furnished by the contract.

CONCLUSIONS.

The Act of Congress of March 2, 1831, Sec. 9, [1 Brightley, 877,] makes it a penal offence to cut timber upon any of the lands of the United States. It is of course a well settled principle of law, that if the contract grows immediately out of, or is connected with an illegal act, courts will not enforce it; but will allow the objection to be made by either party [2 Kent, 466-7], and unless some act, express or implied, upon the part of the Government, would give permission for or justify the use of the land and the cutting of timber, such cutting would be illegal and the contract relating thereto void. The Land Commission was a branch of the Government; the claim of the grantees was presented to the Commission and by it approved. The title to the land did not pass and would not pass except in case of final confirmation; but the confirmation by the Land Commission might remove the act of cutting the timber by the grantees from the effect of the criminal statute. Before the date of the contract the claim had gone to the District Court, and had been by it rejected; but an appeal had been allowed, the effect of which must have been to suspend the effect of the judgment of the District Court.

The whole subject of the validity of the grant was under examination, the Government having in one instance recognized its validity; and there is very grave doubt whether a grantee under such circumstances is liable to criminal prosecution.

The importance of the principle involved will be apparent, in its practical operation, when it is considered that the mining and other industries of the State depend largely upon the use of timber.

If it be true that this contract is void, no contract for cutting or furnishing timber or lumber can be good unless the timber be cut from land the title to which has passed from the Government.

While there may be no doubt as to the fact that the land is public land in this case, the better course appears to be to sustain the contract.

2—As to the second point. The contestants claim that Whitmore & Stevens were by the terms of the contract at liberty to terminate it at any time; that Schwend & Clark were to furnish logs only upon the order of W. & S.; that W. & S. could at any time cease ordering logs, and thereafter they would not be bound to receive any; that the subject of the contract was a mutual venture, and that S. & C. were to take the risk of the success of the enterprise, viz: the condition of the market as to demand for lumber, the same as W. & S.

I find myself unable to agree with them in this. The portions of the contract relating to this point are: S. & C. "agree to supply in such lengths as the parties of the second part [W. & S.] may from time to time order, * * * to keep the mill supplied with logs in sufficient quantities * * * to keep the mill in constant operation in manufacturing of lumber during the term of four years commencing May 24, 1869," and W. & S. agree "to receive from the parties of the first part * * all merchantable logs * * in quantities as the parties of the second part may from time to time require, and manufacture such logs into lumber;" that after May 1, 1870, they will advance not exceeding \$15,000 to be used in getting logs to the mill; that they will advance each year if necessary for the purpose of supplying the mill with logs not exceeding \$15,000.

Considering these clauses together, I am of opinion that the period of the contract was four years, and that neither party had the right to terminate it sooner. The mill was to be run four years; logs were to be furnished by the one and received by the other for that time; but the number required from time to time to keep the mill in operation, and the kind as to length, was under the direction of W. & S. That seems to be a reasonable construction of a reasonable contract; but it would seem to be a forced construction to hold that at any time after S. & C. had expended \$15,000 in constructing the boom and pier, and had 4,000 logs ready

to float to the mill, and 1,300 trees cut and barked (as in this case), W. & S. could at an hour's notice terminate the contract, appropriate the boom and pier, and leave the logs and trees to S. & C. Of course, S. & C. could have made such a contract if they had seen fit to do so; but I do not think they have done so in this case.

3—As to the damages, and the amount to be ordered paid.

FACTS.

The contract (which is the basis of the claim of L. E. White, and is on file as a part of said claim,) is dated May 14, 1869, and was for a period of four years commencing May 24, 1869; under the contract the parties entered upon its performance, and continued nearly fourteen months; the amount of lumber sawed during that time was 6,550,000 feet; and in addition thereto, S. & C. had 4,000 logs ready to float to the mill, and 1,300 trees cut and barked. S. & C. constructed booms and piers as provided for in the contract at the cost of \$15,000. The dam was completed by W. & S. about November, 1869. Pending the completion of the dam, S. & C. went up a fork of the river emptying into the river below the mill, and cut logs, and in order to get these logs to the mill, built a railway at an expense of \$1,000, and incurred an extra expense of \$6,720 in getting the logs to the mill. Whitmore died March 9th, 1870; at the expiration of about fourteen months from May 24, 1869, viz: between July 15th and 31st, 1870, Stevens notified S. & C. that no more logs would be required of them, and thereupon S. & C. suspended operations. They had already invested large sums in making the necessary outlays for carrying on the work to that time and in providing for future operations. Stevens became a bankrupt, and his assignee cut the 4,000 logs into lumber for his estate; S. & C. also became insolvent.

During the carrying on of the work, W. & S. were in the habit of making payments to S. & C. by drafts upon their agents in San Francisco in favor of the employés and other creditors of S. & C.; and after Whitmore's death Stevens drew drafts to the amount of \$18,000 and upwards;

these drafts were never paid, nor were they taken by the payees as payment.

The average cost to S. & C. of cutting and getting logs to the mill under the contract was \$3.50 per 1,000 feet of lumber; the expense of getting to the mill the 4,000 logs already cut at the time of the stoppage would have been \$700, and the cost of chopping and barking the 1,300 trees was in excess of the item \$2,500 stated in the claim, viz: \$8,855. These logs and trees, if sawed, would have produced 6,440,000 feet of lumber.

The amounts stated in the claim and presented for allowance, are:

Cost of railroad,	\$1,000
Extra expense of getting logs to mill,	6,720
Booms and piers, - - - -	15,000
Loss of profits for the 2 years and 10 months, unexpired part of term,	24,000
Cost of the 4,000 logs not used at the time of terminating the contract,	9,500
Cost of cutting and barking 1,300 trees,	2,500
Total,	<u>\$58,720</u>

CONCLUSIONS.

Nothing can be allowed for either of the items, \$1,000 and \$6,720. By the terms of the contract Schwend & Clark were to commence delivering logs May 24, 1869, while Whitmore & Stevens were not bound to have the dam completed before the end of summer. If these expenses were incurred before the end of summer, they were a part of the contract; S. & C. were to deliver the logs at their own cost. It does not appear what portion of these expenses accrued between the end of summer and the time of completing the dam. Even if this did appear, S. & C. could not charge to W. & S. the cost of the road and extra labor; if the dam had not been finished at the agreed time, they could have stopped supplying logs and charged W. & S. with the profits which would have accrued. They could not go on and incur additional expense. W. & S. were in no event to pay more

than \$5.00 per M; and S. & C. could not by building roads, etc., increase the amount to be paid.

Striking out these items, reduces the items for further consideration to \$51,000. The claim was allowed as a whole at \$31,806; there is nothing to indicate for which particular items the allowance was made; therefore, if the sum of \$31,806 can be gathered from any or all of the items properly allowable, (not exceeding, as to any item, the amount stated in the claim) that sum, and no more, can be ordered paid, if the contract be valid.

This Court cannot go beyond the amount allowed by the executor; besides, the claimant has expressly waived all sums in excess of that.

As to the item, \$15,000, cost of booms and piers: S. & C. were to construct these at their own cost, which were to be used by them in earning their profits; and as I hereafter find their prospective profits, and allow them therefor, the cost of the booms and piers must be disallowed. Subtract this from the \$51,000 leaves \$36,000, as stated in the claim, for further consideration.

During the time the mill was run, the amount of lumber sawed, as above stated, was 6,550,000 feet, averaging 503,846 per month. No objection was made to this rate of speed by either party, during the period of running the mill, and is a fair rate for the following 34 months. This rate would give, for the 34 months, 17,130,000 feet, which, at the rate of \$1.50 per 1,000 feet, would give a profit of \$25,715. The 4,000 logs were worth at the cost price \$3.50 per 1,000 feet, less \$700 for floating to mill—\$9,100. Therefore, add together the profits of 34 months, \$25,715
The cost of the 4,000 logs, less floating, 9,100
1,300 trees (amount stated in claim), 2,500

Makes a total of \$37,315
damages sustained by Schwend & Clark.

This amount exceeds the amount of the claim as allowed by \$5,409. The drafts given by Stevens cannot be allowed as an offset.

I have given the facts and conclusions above, so that, if the appellate Court shall be of opinion that the contract is valid, a proper judgment can be entered, and thus avoid further proceedings. If the contract be valid, the proper amount to be ordered paid to the claimant will be, in the judgment of this Court, the amount of the claim as allowed, viz: \$31,806.

It being my opinion that the contract was valid, it follows, that the application of L. E. White for the payment of his claim must be granted, and that \$31,806 be ordered paid.

Let a decree be entered accordingly.

ESTATE OF OLIVIER ALEXANDRE P. COLETTE.

No. 7292—Sept. 28, 1876.

WILL.—APPOINTMENT OF EXECUTOR.—Where it can be fairly determined who is the person nominated as executor, inaccuracies in designating him, (he being the chief officer of one of the subordinate assemblies of a secret benevolent corporation or order,) may be explained by testimony extrinsic to the will; and the person intended by the testator will receive the letters.

Construing sections, C. C., 1840, 1871.

Barstow, Stetson & Houghton, for executor.

Tully R. Wise and *E. P. Cole*, contra.

Application for probate of will. The question is as to appointment of an executor. The will reads:

"I appoint Mr. Pierre Theas, merchant, of the said City and County of San Francisco, actually the President of the Grove 'Perseverance' No. 10, A. O. U. D., of the said City and County of San Francisco, or his successor in office at the time of my death, to be executor," &c., &c.

Deceased was a member of a society known as the United Ancient Order of Druids, which is composed of subordinate bodies called "Groves." The Grove to which he belonged was composed of French-speaking men, and its proceedings were in the French language. The name of the order was, in French, "L'Ancien Ordre Uni des Dru-

ides," and the letters A. O. U. D. were used by the French; Americans used the letters U. A. O. D. There is no officer known as President; the presiding officer is called Noble Arch. At the date of the will Philip Theas (not Pierre) was Noble Arch of Perseverance Grove No. 10, of which Grove deceased was a member. His term of office expired, and at testator's death proponent was Noble Arch of Perseverance Grove No. 10.

By the COURT: Proponent is entitled to letters. The variance in the initial letters and the name of the office is fully accounted for; and the proponent is designated by his office.

ESTATE OF IDA PLAISANCE.

No. 7287—Oct. 18, 1876.

EXECUTOR.—INCOMPETENCE OF PERSON NAMED IN WILL TO TAKE LETTERS BY REASON OF HIS IMMORAL CHARACTER.

Where testatrix, who was a woman of the town, nominates, as executor, her lover, a man who has done nothing for his own support for years; but has lived in the house with testatrix and subsisted upon her gains; and who admits that, during most of the period, he has "lived by his wits," the Court will refuse letters testamentary, such a person being an improper subject to be clothed with authority by the Court.

Construing section, C. C. P., 1350.

E. J. Pringle, for proposed executor.

Geo. N. Williams and *T. H. Rearden*, for absent minor heirs.

The testator was a Frenchwoman of disreputable chaaac-ter, who died of small-pox in this city. She left one child, residing in Bordeaux, France. She executed a will six days before her death, and her mother, residing in France, was made a legatee to the extent of \$10,000. The sum of \$3,000 was bequeathed to J. M. Wendall, a mulatto, who had cohabited with deceased since 1873. Some furs and jewelry were left to the mother, and the remainder of the estate, valued at \$16,000, was to be divided between Wendall and

the mother. No mention was made in the will of the child. Wendall was named sole executor without bonds. On information suggested by the French Consul, on behalf of the mother and child, opposition was made to the appointment of Wendall on the ground that he was an improper person to act as executor for want of integrity.

By the COURT: The proof on the hearing showed, and was admitted by Wendall to be true, that he had done no work of any kind since 1871, and for many years he had lived with testatrix, taking his meals with her and being furnished a room in her house. The fact of the gross immoral associations surrounding the applicant and the admission by him that he had "lived by his wits" for that period are grounds for refusing him letters. His mode of life is evidence that he would be incompetent to faithfully discharge the duties of the trust; and the gross immorality as shown by his mode of life is evidence in itself of great lack of integrity.

The application of Wendall is denied, and special letters are ordered to be issued to the Public Administrator.

ESTATE OF LUCO RADOVICH.

No. 3640—Nov. 6, 1876.

LEGACY.—DEMONSTRATIVE.—Where a special fund is set apart to pay demonstrative legacies, the Court will not endanger the means of their payment, by directing the payment out of such fund of a legacy that may be satisfied, ultimately, from another source.

Construing section, C. C., 1357; affirmed, Sup. Court, April 7, 1880.

G. W. Tyler, for petitioner.

A. D. Splivalo, for executors.

This is a petition by Antonio Radovich for the payment of a legacy of \$1,000.

Testator died Dec. 24, 1869, and his will was admitted to probate Jan. 28, 1870. At the time of his death his estate in this State consisted of \$10,564, cash in the hands

of D. Ghirardelli, one of the executors, and other property of the value of \$2,850. He had real estate in Virginia City, Nevada, from which the executors have since received rents amounting to \$15,878.50; and January 7, 1876, they received \$3,500 insurance on one of the buildings in Virginia City destroyed by fire during administration. That building was under lease by testator for a term of years, having a year or so still to run; the tenant has erected a temporary building and is still paying the rent, \$100 per month. The total of cash received from property in this State is \$2,670.-48, of which \$177 was from a coffee stand, and the balance collected from Ghirardelli. Ghirardelli has become a bankrupt, and an agreement has been made between himself and his co-executors by which the debt owing by him is being paid in instalments. The balance of cash on hand, as appears by the account rendered April 5, 1876, is \$9,741.49, composed of the insurance money and rents received from the Virginia City property.

May 8, 1876, an order was made for the payment of fifty per cent. of the principal money of the cash legacies, which was paid except that to the petitioner, Antonio. Petitioner insists that the whole of his legacy, with interest from Dec. 24, 1870, should be paid out of any money in hand; while the executors claim that the insurance money should remain to erect permanent buildings at the close of the lease, and that the rents are to remain, to be disposed of as provided in the 10th, 11th and 12th clauses of the will.

The will gives to his brother, Biaggio, \$1,000; to his brother Antonio \$1,000; to his sister Angelica \$500; to another, \$500; to D. Ghirardelli \$2,000 for the education of his nephew Giovanni; and provides, "it is my desire and I so order it that my debtors be not pressed, but that they be allowed by my executors reasonable time wherein to pay what is due to my estate. Then follow clauses:

10th—That the executors deposit in some savings bank in San Francisco all the rents derived from the property in Virginia City, Nevada, and all the rents and profits derived from his estate, and that the same be applied by them in the manner hereinafter mentioned.

11th—That out of said rents and profits the executors send to his mother \$75 every six months during her life.

12th—That the executors give such education as they shall deem fit and proper to his nephews and nieces, children of Biaggio, and that all the expenses of said education be paid out of the rents and profits of his estate, and in the event that the same should not be sufficient to meet said expenses, the executors are directed to sell any of the real estate that may be necessary for the purpose.

13th—After all the above gifts and bequests are paid, and the expenses of the education of the children of Biaggio, the residue is bequeathed to the children of his brothers and sisters.

By the COURT: Looking at the provisions of the will, the persons named therein as beneficiaries, and the property then owned by him, as the testator must have looked at them at the time of his death, it appears that the money in the hands of Ghirardelli was ample to pay all debts, expenses, and the \$3,000 legacies to his brothers and sisters, and that he intended that the rents of the Virginia City property should be used to maintain his mother and educate the children of his brother Biaggio.

It is true that he does not in terms make the legacies to the brothers and sisters demonstrative legacies, to be paid out of the California assets; but the annuity to the mother and amounts requisite to educate the children of Biaggio are demonstrative, to be paid out of the Virginia City property, the rents and profits of which are directed to be reserved for that purpose; which in effect confines the payment of the legacies to the brothers and sisters to the proceeds of the California assets, at least so long as the rents of the Virginia City property may be required for the annuity and the children.

Therefore the brothers and sisters will have to depend, at least for the present, upon the California assets, and cannot be paid out of the insurance money nor out of the rents of the Virginia City property.

The executors have sufficient funds in hand to pay all the legacies in full, and for rebuilding the destroyed building, without interfering with or jeopardizing the proper education of the nephews and neices, or the annuity; but on account of the terms of the will this Court has no power to apply the rents or proceeds of the Virginia City property to the payment of said legacies.

It may be mentioned that Ghirardelli has expended the \$2,000 provided in the will for Giovanni Radovich.

The order for the payment of \$500 to Antonio Radovich on account of his legacy is continued in force, but his present application for the payment of any further sum on account of his legacy is denied.

ESTATE OF W. B. HARRISON.

No. 5343—Dec. 11, 1876.

SUCCESSION.—ILLEGITIMACY.—A HALF BROTHER BY THE SAME FATHER BEING ILLEGITIMATE, CANNOT INHERIT. HALF SISTERS BY THE SAME MOTHER ARE ENTITLED TO TAKE.

CONFLICTING SECTIONS.—Sections 1387 and 1388, C. C., conflict. Therefore, Sec. 1388 prevails, under Sec. 4484, Pol. Code.

Construing sections, P. C., 4484; C. C., 1387-88.

J. Naphtaly, for administrator.

M. B. Blake, for half-sisters.

A. W. Roysdon, for Attorney General.

BLAKE: The half-sisters take the entire estate, to the exclusion of the half brother. Williams on Descent, 416 to 419; 8 Leigh, (Va.) 307; 2 Root, (Conn.) 281; 1 Dev. (N. C. Eq.) 349; Civil Code, 1386-7-8. Pol. Code, 4484; 18 Cal., 96; 53 Maine, 495.

ROYSDON: Being alien illegitimate, they cannot inherit. Bing. on Descent, chap. inheritance, alien, illegitimacy; 4 Kent, 414 to 417; Potier on Suc., Art. 3, Sec. 3.

By the COURT: The male applicant is a half brother of deceased by the same father; the female applicants are half-sisters by the same mother; all are illegitimate, and all are natives and residents of Jamaica. The Attorney-General claims an escheat. The half-brother can take nothing, as the father of an illegitimate does not inherit, nor can the father be a conduit. As to the right of the half-sisters, there is a conflict in the Code. Sec. 1387, C. C., provides that an illegitimate child "does not represent his father or mother by inheriting any part of the estate of his or her kindred"; while Sec. 1388 provides that if an illegitimate child dies intestate without issue, the estate goes to his mother, or in case of her decease, to her heirs-at-law. An illegitimate child is the heir of its mother. By Sec. 4484, Pol. Code, in case of conflicting sections the provisions of the section last in numerical order must prevail; therefore Sec. 1388 prevails, and the half-sisters, being heirs of the mother, she being dead, are entitled to the estate of the deceased.

ESTATE OF JOHN DUNN.

No. 6573—Dec. 11, 1876.

JURISDICTION OF PROBATE COURT.—CANNOT TRY TITLE AS BETWEEN ESTATE AND STRANGER.—LEGAL TITLE of real estate held by decedent, when claimed by a stranger under equitable claim.

HELD, that where there is a colorable title to the realty in the decedent, it is not competent for the Court, in cases where the question is one requiring evidence to determine, to assume that the estate has no interest; but the equitable claimant should be relegated to a Court of Equity to establish his rights.

This is not in conflict with the duty of the Probate Court to decline to burthen its record with decrees disposing of interests in property which have no foundation whatever.

Construing sections, C. C. P., 97, 1665.

R. W. Hent, for petitioner and devisee.

E. A. Lawrence, for executrix.

October 9th, 1866, John Dunn conveyed the premises in question to John Pforr. Nov. 8th, 1866, Pforr conveyed the premises by deed of gift to Mrs. Dunn, wife of John Dunn.

Feb. 1st, 1868, Dunn obtained money from one Stewart, and to secure the payment thereof, Mrs. Dunn, at the request of her husband, joined him in a conveyance of the premises by grant, bargain, and sale deed to Stewart; no defeasance was executed, but the transaction was a mortgage as between the parties. Dunn having paid Stewart the money borrowed, June 10th, 1869, Stewart executed a grant, bargain and sale deed to Dunn and wife, with a consideration of \$6,000 expressed.

No other consideration existed than the payment of the borrowed money. In 1869, one McAtee executed a deed of the premises to Dunn, and in 1872, Dunn obtained a grant from the city; but it does not appear that any title passed by that deed or grant.

By the will of Dunn the property is devised to his brother, who now claims distribution. On the other hand, Mrs. Dunn claims that the property is her own separate property; that the deed from Stewart to Dunn and wife conveyed no interest or title to Dunn; that this Court has jurisdiction so to declare, and to decree that the estate has no interest in or title to the property to distribute under the will.

By the COURT: Probate Courts have jurisdiction to determine whether or not an estate has *any* interest in or title to property, in order to determine whether or not there is anything to distribute; they will not cumber their records with orders of distribution where it appears that there is nothing to distribute. But, as in this case, where there is *some* title, or at least apparently some title, viz: as by the deed from Stewart, the Probate Court has not jurisdiction to determine the quality of that title, whether it be good or bad, whether whatever title passed to Dunn was in trust for the wife; but will distribute the interest of the estate, that is, all that deceased had at his death and all that has been since acquired, and will leave the parties to pursue their remedies as they shall be advised.

Mrs. Dunn is the owner of at least the undivided one-half of the premises, and this Court has no jurisdiction over that one-half except to declare that it does not belong to the

estate, and to refuse distribution of it. As to the other half, this Court has not jurisdiction to determine what is the interest of the estate in it, but will simply distribute whatever interest the estate has in it.

Probate Courts have equity powers for certain purposes and to a certain extent; but they have not power to declare a trust, nor to set aside a deed properly executed and delivered.

Let a decree be entered according to this opinion.

ESTATE OF EDWARD WINSLOW.

No. 8060—Dec. 13, 1876.

WILL.—SIGNATURE OF WITNESS.—Where a will appears to have received only a partial signature by attesting witness, as, for instance, the first name or initials; and the last name does not definitely appear to have been actually traced (either with ink or pencil), the execution of the will is imperfect and the probate should be denied.

Construing section, C. C., 1276.

H. A. Powell, for widow.

M. C. Hassett, for executor.

By the COURT: In this case the witness, Joseph P. Jones, wrote his name. The other witness, William H. Ford, wrote the abbreviation "Wm." and the first down stroke of the initial "H." The second down stroke of the "H." is indistinct but discernible; and there the signing stopped, as if the ink ceased to flow. Some faint marks as if of a pen point are discernible through a powerful glass, where the name "Ford" should have been, but no letter can be traced. It is not a case of faded ink, but of failure to write. No person can tell from an examination of the paper whether the witness' name was William H. Ford or William H. Smith, or William H. anything. The word Ford is an essential part of the witness' name. Under these circumstances I must find that the witness Ford did not sign his name as a wit-

ness, and it consequently follows that the proposed will of Feb'y 24, 1876, was not properly executed and is not the will of deceased. The paper of Feb'y 14, 1876, is properly executed, and is the will of deceased.

ESTATE OF THOMAS H. SELBY.

No. 6486—Jan. 17, 1877.

CLAIM, INTEREST ON, WHEN ALLOWABLE.—The allowance of a claim by the executor and Probate Judge is not such a proceeding as will make the claim the judgment of a Court and so become interest bearing. The claim is not a judgment until it has passed through account and settlement and has been ordered paid.

It is doubtful if any claim bears interest, when the payment of interest could not be enforced against decedent if he were alive. That is the true test.

Construing sections, C. C., 1920; C. C. P., 1497, 1649; affirmed, Supreme Court, March 26, 1877.

Delos Lake, for claimants.

S. L. Johnson, for executor.

By the COURT: 1—This is an application for the payment of interest upon the claims presented respectively by the following named persons:

M. W. Belshaw & Co.,

E. H. Hammer, and

A. H. Phelps.

It cannot be successfully claimed that the allowance by the executors and the Judge constitute a judgment. The claim is not then placed beyond criticism; is not binding upon the heir. Not until the proceedings detailed in Secs. 1647 and 1649, C. C. P., viz: the reporting of its allowance, the settlement of the account, and the *order for its payment*, does it lose the character of a claim, and take on the phase of a judgment. Not till then can the claimant enforce payment, or have any process; not till then has it been ascertained and determined *what* are the debts of the deceased; not till then has the heir had any voice in the matter.

The action theretofore had, viz: allowance and approval, has been without any notice to the heir. According to Sec. 1920, C. C., a judgment, to bear interest as such, must be a

judgment "recovered in the courts of this State." The action of a Judge, in approving the allowance of a claim, is not a judgment rendered by a Court.

2—The allowance and approval do not constitute a settlement of accounts, within the meaning of Sec. 1917, C. C. When an account between persons is settled, and the balance is ascertained, neither can reopen it except for fraud, mistake, or matters of such character; whereas, upon the settlement of the account of the executor, the heir can defeat an allowed claim in many other ways. Not until the proceedings noted in Sec. 1647, C. C. P., does an allowed claim become a settled account, by reason of its allowance, even if it does then.

3—The remaining point for consideration is whether these claims bear interest by reason of being within the provisions of Sec. 1917, C. C., viz: moneys due on an instrument of writing, moneys lent, moneys due on any settlement of accounts, and moneys received to the use of another.

Clearly the claims are not within the first, second, or fourth clauses; so we have simply to ascertain whether there had been any settlement of accounts between these claimants and testator in his lifetime. The claim of Belshaw & Co. is for merchandise sold and delivered; payments were made on account; but there is no proof that the minds of testator and the claimants met upon the sum unpaid. The application for payment of interest upon this claim is denied.

The claim of A. H. Phelps is for services, etc. The balance due Feb'y 28, 1875, was entered in the books of testator, viz: \$1,136.80. The other items occurred thereafter. The credits exceed the balance due Feb. 28, 1875; and there has been no subsequent settlement; therefore the application for payment of interest on this claim is denied.

The claim of E. H. Hammer is also for services, etc. The balance due Feb. 28, 1875, as entered in testator's books, is \$3,125.12; amounts of credit since, \$1,576.06; no dates are given when these credits occurred; therefore the difference between these sums is entitled to bear interest at the rate of ten per cent. per annum from Feb. 28, 1875, until paid.

In my opinion, any claim, to bear interest after allowance, must have been of such character as that it would draw interest during the lifetime of deceased.

There is no *forbearance* on the part of the creditor, for he cannot proceed to enforce payment except in due course of administration. The estate has not the *use* of money, in the sense that living people use money.

Allowance by an executor does not change the character of any debt owed by the deceased.

Let a decree be entered in accordance with this opinion.

ESTATE OF JOHN KEHOE.

No. 5785—Feb. 15, 1877.

ACCOUNT, EFFECT OF SETTLEMENT.—NOT A JUDGMENT.

An executor dies after an account has been settled showing a balance in his hands.

A claim is presented to his administrator and allowed. His estate is insolvent.

It is sought to make such claim a preferred one, as a judgment.

HELD, that the settlement of account was not a judgment in that sense; but merely a finding that so much property was in his hands for further administration.

Construing sections C. C. P., 1637, 1643; affirmed, Sup. Court, Feb. 19, 1878.

J. M. Burnett, for Cronin.

H. K. W. Clarke, for Mrs. Travers, a creditor.

J. M. Allen, for other creditors.

Warren Olney, for executor.

John Kehoe was executor of the will of one McConnell, and his account as executor was settled July 24, 1873, showing a balance in his hands of the funds of the estate, \$3,876.95. Upon Kehoe's death, Cronin was appointed administrator with the will annexed of the estate of McConnell. Cronin presented to the executor of Kehoe's will a claim for \$3,876.95, the amount as above stated, which was allowed by the executor and approved by the Judge. The estate of Kehoe is insolvent. Cronin now applies for an order adjudging his claim to be a preferred one, as a judg-

ment, and directing that it be paid in full, there being funds sufficient if it be preferred.

The point in issue is this: Did the settlement of the account of Kehoe as executor of McConnell's will constitute a judgment against him so as to entitle it to be preferred, under Sec. 1643, C. C. P.?

By the COURT: The decree settling the account is not a judgment within the section referred to. It has none of the indicia of a judgment; it does not necessarily bear interest as a judgment; it was merely an ascertainment that, from the matters involved in the settlement, there was that amount then in the hands of Kehoe.

ESTATE OF MOSES CHINMARK.

No. 7642—April 11, 1877.

WILL.—CANCELLATION of a SINGLE CLAUSE therein by erasure only. Where the purpose to so cancel is evident, it should be admitted as accomplished and the will proved without such clause.

October 2, 1877.

ATTORNEY'S SERVICES. Where services have been rendered to persons who are executors for their individual benefit in litigating their rights as legatees, such services are not a proper charge to be allowed them in their accounts with the estate.

Construing sections, C. C., 1292; C. C. P., 1616; affirmed, Sup. Court, July 18, 1877.

J. M. Wood, for executors.

M. B. Blake, for heirs.

The will, as propounded, was executed by the deceased January 31, 1877. The will contained the following clause:

“Second—I give and bequeath unto the executors of this my last will, to wit, unto the said Hezekiah Avery, William Bell and H. N. Bissett, of San Francisco, all the rest, residue and remainder of my estate, both real and personal, in equal proportions.”

The day following, to wit, Feb. 1, 1877, the deceased, with the intent and for the purpose of cancelling the said

clause, with his own hand drew two ink lines over and upon each line of said clause, which ink lines covered each and every word in each and every line of writing in said clause; also one line in ink diagonally from the left hand upper corner to the right hand lower corner of the same clause; also three diagonal lines in ink from the upper line of the clause down to the left and to and including the last line of the clause; said cancellation still remains on the face of said instrument, but notwithstanding such cancellation the words of said clause are plainly legible.

By the COURT: From the foregoing facts the conclusion of law is that the deceased in his lifetime cancelled the said clause, and that the same is not a portion of his will; and that the instrument propounded, omitting the said cancelled clause, is the will of deceased, and that probate thereof should be granted.

October 2, 1877.

Application of J. C. Bates, Esq., for allowance of compensation to himself as attorney for the executors on the probate of the will and on appeal from the decree of this Court. Evidence was taken in reference to three points, viz:

1. Value of services in and about probating the will, not including the contest;
2. Value of services for the contest;
3. Value of services on motion for new trial and appeal.

By the COURT: The Court finds the value of said services to be, for the first, \$200; for the second, \$300; and for the third, \$400; that the first mentioned services were rendered in and about the duty of the executors in proposing the will for probate; that the second mentioned services were rendered in and about the duty of the executors to resist the contest, because, before the termination of such contest, the executors were not fully advised as to the facts upon which the contest was made, and the will did not show upon its face that the erasure was made by the testator. The third mentioned services were rendered in and about

an appeal, taken by the executors from the order of this Court, adjudging that the cancelled clause was no part of the will, to the Supreme Court, which appeal was taken at their own instance for their own personal interest; they were the residuary legatees and devisees in the will as first executed, were omitted by the cancellation, and were the only persons interested in taking the appeal, and the only persons to be benefited by a reversal. The appeal was not taken in and about the care of the estate, nor was it their duty as executors to take the appeal. The decree of this Court was affirmed by the Supreme Court upon the sole argument of the attorney for the appellants, the Court declining to hear arguments by the respondents.

Therefore, for the first and second mentioned services said attorney is allowed \$500; and allowance for the third mentioned services is refused.

ESTATE OF CONRAD BARTELS.

No. 7836—July 14, 1877.

NOTICE ON PROBATE OF WILL.—Not waived by minors by an appearance in Court on the day of hearing. The ten days' notice of hearing must be given in the manner prescribed by statute, namely, by mailing or by personal delivery to the minors of copies of the notice. The Court otherwise does not acquire jurisdiction.

CONTINUANCE FOR THE PURPOSE OF GIVING SUCH NOTICE CANNOT HELP THE DEFECT. The notice, served or mailed, must be for the day specified in the published notice. All proceedings should therefore be vacated after the petition and a new order of publication given, accompanied by proper service of notice upon the minors.

Construing sections, C. C. P., 1303-4-6.

J. C. Zabriskie for proponent.

This case came on for hearing on application to probate will. Notice of the hearing was published according to law. Deceased left him surviving a wife and six minor children. No notice was served upon the children either by mailing or personally. The children were all present in Court, and it was asked that their personal presence be taken as a waiver

of service; it being claimed that the object of the notice was that the children might come, and as they were here, the object was attained.

By the COURT: The statute has prescribed but two modes of service upon heirs, viz: by mailing or by delivering personally. Minors can waive nothing, cannot consent, and nothing can be construed against them. They must be served in one of the modes prescribed by the statute; in the absence of proof of such service, the Court has no jurisdiction of them or of the alleged will. Their personal presence in Court would have no other or further effect than a written appearance signed by them.

The attorney for the proponent then asked the Court to continue the hearing in order that a copy of the notice might be served on the children.

The COURT: That will not aid you. The notice already published is that parties appear to-day. You cannot of course now give these children ten days' notice to appear to-day. The notice must be served on the children at least ten days before the day fixed in the published notice for the hearing. You will have to commence again, starting upon the petition heretofore filed, take a new order fixing a day for hearing, and publish and serve notice of that day so fixed.

ESTATE OF J. W. WINTERS.

No. 3901—July 18, 1877.

HUSBAND AND WIFE.—DEALINGS BETWEEN MAN AND WOMAN AS HUSBAND AND WIFE, such relationship being actually impossible, (there being an undissolved former marriage of the man with another woman), cannot be held to constitute a partnership.

HELD, that the first wife is entitled to half of common property.

Construing sections, C. C., 55, 155, 1402, 2395,

M. Cooney, for Catharine.

R. P. Clement, for Ann.

About 1845-6, Winters, deceased, intermarried in Ireland with one Catharine, now living, which relationship has not been dissolved, although he soon deserted her and came to America. In 1857 he married Ann, or at least the ceremony of marriage was performed, and he lived with her until his death in 1869, and had several children by her. He made a will giving all his property to Ann. She was aware before his death (not before her marriage) that Catharine claimed to be his wife; but she, in administering the property, treated it as the community property of herself and deceased.

The property was accumulated in business during the time of the relations between deceased and Ann.

Upon the hearing for distribution, Ann claims that if she was not the wife of deceased, she was his business partner, and that she is entitled to one-half of the entire property as surviving partner, and to one-half of the other half (being all that deceased could dispose of by will) under the will.

By the COURT: There is no evidence that deceased and Ann at any time contemplated or formed a commercial or business partnership; it was *marriage* they had in view; that is, *she* intended marriage, and he imposed upon her by pretending that he could and did marry.

It is true that marriage casts upon the parties certain rights and duties in some respects akin to the rights and duties of partnerships, but not because of or as partners, but because of the marital condition and as husband and wife; and the rights and duties which either may wish to extract must belong to or spring from the relation they had in view, and not from another relationship now for the first time brought forward.

Doubtless, she as a wife (or supposing herself to be such) aided in the accumulation of the property; but she did it as *wife*, not as partner.

Ann has been imposed upon, most egregiously, and in that way which is the very worst in which a woman can be imposed upon; and the children have the right to hold the

memory of their father in utter abhorrence; but I know of no principle of law which prevents Catharine from being entitled to one-half of the estate now remaining.

As conclusions of law, Catharine is entitled as surviving wife to have distribution to her of one-half of the estate now remaining, and Ann is entitled to have distribution to her of the other half, under the will. The children are not entitled to any share.

Let a decree be drawn accordingly.

ESTATE OF GEORGE H. MUMFORD.

No. 6721—Aug. 22, 1877.

WILL.—WIDOW'S SHARE IN ESTATE.—SHE TAKES ONE-HALF OF COMMUNITY PROPERTY AS SURVIVOR, NOT AS HEIR.

"MY ESTATE" MEANS THE ESTATE SUBJECT TO TESTAMENTARY DISPOSITION.

RENUNCIATION.—Where a renunciation is required by the terms of the will, it must clearly appear what is to be renounced. To renounce "all claim to my estate, except under this will," does not cover widow's share of community property.

Construing section, C. C., 1402.

W. W. Cope, for the widow.

Jarboe & Harrison, for the children.

The widow of testator asked for distribution to herself of one-half of the community property, of the legacies to her under the will, and of her share of the legacies to certain children who have deceased.

In opposition, it is urged that the will compelled her to elect which she would take, either her share of the community property or the legacies named for her in the will, and that she cannot have both.

The language of the will is: "The foregoing bequests to my wife are made upon the condition that she shall renounce all claim against my estate except under this will." The widow has filed a renunciation in the language of the will.

By the COURT: The reasonable construction of the will is, that the widow was not put to a waiver of, nor did she waive, her rights as survivor of the community. "*All claim against my estate.*" These words do not embrace her share of the community property; they embrace that which he owned and could dispose of.

In order to put a legatee to an election, the obligation to elect must follow from direct requirement or from necessary implication. There should be an antagonism in the two rights. If the will had said, "she shall renounce all claim to the property of the community," or words of like import, there would be no room for question; but the words of the will do not by necessary implication require her to forego her right as survivor in order to take as legatee; indeed, the words are consistent with the idea that he knew that she had some claim against him for money or other thing, and that he intended the legacies to be taken in place of asserting such claim.

The widow is entitled to one-half the estate as survivor of the community, to the legacies named for her in the will, and to her share of the legacies named for the children who have deceased.

ESTATE OF RICHARD TOBIN.

No. 6566—Aug. 22, 1877.

DEVISE OR BEQUEST TO "CHARITABLE OR BENEVOLENT SOCIETY."—The Boys' Roman Catholic Orphan Asylum at San Rafael is a charitable and benevolent society, under Sec. 1313, C. C., and is, as such, entitled to take a bequest.

Construing sections, C. C., 1275, 1313.

D. Rogers, for executor.

J. M. Burnett, for Asylum.

G. W. Tyler and *Mogan & Sullivan*, for other legatees.

The will is dated June 10, 1875, and disposes of the estate as follows:

To the Boys' Roman Catholic Orphan Asylum at San Rafael, Marin County, California, one-fourth;

To Michael Tobin and Alice Tobin, father and mother of testator, one-fourth;

To Ellen A. Fitzgerald *all the rest and remainder, being the one-half.*

By the COURT: It is claimed on behalf of all the other legatees that the legacy to the Orphan Asylum is void under Sec. 1275, C. C.; on behalf of Fitzgerald that she will take that share as residuary legatee; and on behalf of the father that he will take the share as heir, and that Fitzgerald's interest is limited by the will to the one-half of the estate, as named in the will.

The effect of Sec. 1313, C. C., is to qualify the terms of Sec. 1275; and charitable and benevolent societies and corporations may take under a will. The "Boys' Roman Catholic Orphan Asylum at San Rafael," being a charitable and benevolent society, the bequest to it is good, and the estate should be distributed according to the terms of the will.

ESTATE OF HEPSABETH HANNIGAN.

No. 7751—Sept. 1, 1877.

WILL.—MENTAL INCAPACITY ARISING FROM ALCOHOLISM.—A narrative of facts showing a mind impaired from such cause.

UNDUE INFLUENCE not a factor in arriving at a decision unfavorable to a will made by a person so mentally unsound.

Constrning sections, C. C., 1272; C. C. P., 1312.

E. S. Pillsbury and *Budd & Budd*, for contestant.

Alexander Campbell and *H. A. Powell*, for proponent.

Samuel Fisher, former husband of deceased, died at Stockton in April, 1874. In the latter part of that year she removed to San Francisco and took rooms and board; and for some months next ensuing roomed and boarded at two

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or three places respectively. In 1875 she purchased the residence 412 Jones street, where she continued to reside until her death.

In May, 1876, she first met Mr. Hannigan. Prior to that she had at times received attentions from two or three men of nearly her own age; but from the time that she and Hannigan became acquainted, or soon after, he was the subject of her thought and conversation, and marriage to him was her prevailing wish. She and Hannigan met at the houses of mutual acquaintances, and passed evenings engaged in social amusements, such as card-playing, and the like; and then he became a constant visitor at her house.

Her health was quite poor, and she had ill turns of physical and mental prostration. In November, 1876, they became engaged to marry. About that time she became unable to leave the house, and was thereafter mostly confined to her bed. It was arranged between them that their marriage should occur at Christmas, 1876; but she being then sick in bed, it was postponed.

On the 11th day of January, 1877, the marriage ceremony was performed between them. That afternoon she, accompanied by her nurse and a friend, rode to the office of the Safe Deposit Company, she being bolstered with pillows and taking stimulants during the ride; she gave directions that her funds and property in the vaults of the company should be subject to access by Mr. Hannigan.

After returning home she tried on a wedding dress which had been made for her, and in the evening was dressed and aided down stairs from her room to the parlor, and was aided to stand while the ceremony was proceeding.

The clergyman officiating thought that the circumstances were peculiar, but as a number of reputable people were present he did not deem it necessary for him to institute special inquiries. She sat in the parlor in an easy chair during the evening, receiving stimulants from her nurse. Two days after that, the will in question was made.

Prior to the marriage ceremony, she had sent for an attorney who had formerly transacted business for her, and she advised with him in reference to a will, and he prepared

the will in question and was present at its execution. Two physicians were also present, and subscribed to the will as witnesses. One physician was called in to examine her as to soundness of mind; his interview did not exceed thirty minutes, but he declared her of sound mind. Another physician, who had before attended upon her, did not upon the trial express a decided opinion upon that subject; but on the same evening of the execution of the will, after leaving the house, did declare that he had that evening witnessed the execution of a will, and that the woman who made it was no more fit to make a will than a boy of four years.

The attorney read the will to her, section by section, and asked her if that was her wish, to which she assented; she seemed, to the persons present, to understand the business in hand, although she was very ill and weak; the will was executed and attested in due form.

The story of her remaining days is soon told. She failed rapidly. On the 26th of February Dr. Ingerson was called; he found her in a moribund condition; by the 10th of March her mind was entirely gone; she was then weak, sick and imbecile, helpless and senseless, in which condition she lingered until the 5th of April, and then, the end.

During the lifetime of Mr. Fisher, at least for some time, Mrs. Fisher had been addicted to the use of intoxicating liquors, to the extent of being frequently under their influence, causing loss of sleep, restlessness, and occasional walking at night. After his death she drank more; and during the last year or two of her life she consumed on an average a gallon of whiskey a week. For months before her death she had such a craving for liquor that she could not resist its influence.

Her physicians warned her that death would ensue unless she ceased such free use of alcohol, but without effect. The demijohn had to be hid from her, and the whiskey doled out to her in smaller quantities. She would have it, and a tumbler of it was placed on her table on retiring, for night use. Dr. Langdon, who had been her physician in Stockton, and saw her after she removed to this city, testified that her intellect was much impaired by liquor; that two years

before her death he observed evidences of approaching dementia; that in San Francisco she was weak-minded, failing gradually; that she had organic disease of the liver induced by alcohol. Other physicians, among them Dr. Shurtleff, of the Insane Asylum at Stockton, and Dr. Clark, of the Nevada State Insane Asylum, were examined as experts, and testified as to the effect of alcohol upon the brain. Blandford, a medical writer, says that women, from the delicacy of their organization, are more susceptible to alcoholism and its effects than men; that when they reach a certain point, there is no hope. The natural and necessary effect of the liquor used by her was to permanently impair her intellect; and where fixed mental disease has supervened upon intemperate habits, the person is incompetent and irresponsible. (5 Mason, C. C., 28.)

Various persons, friends and associates of the deceased, were examined as witnesses, some testifying to a large use of liquor, frequent intoxication, strange actions, childish and foolish deportment, and a love of youthful display with gay colors in dress; while others saw nothing to excite remark. The line between the two classes of testimony is strongly marked; but the view which I take of this case does not require me to express an opinion as to the respective truthfulness and good faith of these witnesses, with one exception. That exception is the alleged husband of the deceased. She was 63 years of age, he 46; she was wealthy, he impecunious; she weak in mind and failing in health, he strong and vigorous. He, knowing that she could live but a short time, that she was drinking herself to death, that thoughts of love, association, procreation, were absurd, took her for her money.

He testified at one time that he never saw her intoxicated, but was forced to admit that he hid the demijohn of whiskey to keep it away from her. He obtained \$2,500 of her money at a time when she was not able to transact any business, and applied the most of it to his own use.

Taking into consideration the facts that for years she had been addicted to the excessive use of alcohol, that such use caused the disease of which she died, that it weakened her

body and mind, that its necessary result was to produce mental disease and physical death, that her intellect was impaired as early as 1875. That in November, 1876, she had become a confirmed invalid; that in February, 1877, she was in a moribund condition, that her mind entirely gave way in March and that she died in April, I am forced to conclude and so find, that at the time of the execution of the alleged will the deceased was not of sound and disposing mind; that probably from and after April, 1876, certainly from and after November, 1876, she had not sufficient mind to make any important contract, or to comprehend her relations in life, the character and condition of her property, and the persons to whom and the proportions in which she wished her property to go.

The conclusion of law is that the proposed paper is not the will of deceased and that she died intestate.

I have not, herein, considered the question of undue influence, for the reason that, if she was of unsound mind, it does not matter whether influence was or was not exercised. It is true that the proposed will would give the bulk of the estate to Mr. Hannigan. If the deceased had been of sound mind, she would have had the right to do so. She might, possibly, have found reasons therefor in the differences which had arisen in the family, in coldness of demeanor and apparent neglect on the part of those few with whom blood connected her. I base my opinion of this case solely upon the mental condition of the deceased, leaving the living to form such estimate of filial duties performed and unperformed as they may be advised.

Let a decree be entered accordingly.

ESTATE OF PHILIP DONOHO.

No. 8659—Oct. 11, 1877.

WILL.—OLOGRAPHIC.—SIGNATURE in this manner: "This is the last will of Philip Donoho," at the commencement of an olographic will, there being no subscription at the foot, is sufficient. It is otherwise with a will attested by witnesses, such attestation requiring a *subscribing*, and not a mere *signature*. This rule is in conformity with the common law decisions, the civil law of Europe requiring a subscription.

It must appear, however, that the document has been completed.

Construing sections, C. C., 1276-7; C. C. P., 1309.

George & Loughborough, for proponents.

E. J. Pringle and *J. M. Allen*, for contestant.

J. F. Finn, for heirs.

The entire paper was written by the hand of the deceased. It is dated; but no name is subscribed at the foot. The paper is complete in itself as to the disposition of property. It was found in the safe of the deceased. The name of the deceased appears in the paper at the commencement only, which reads thus: "This is the last will and testament of me, Philip Donoho," etc.

MR. PRINGLE: The paper must be signed at the foot. Sec. 1277, Civil Code, which requires that an olographic will must be signed, is taken from the civil law, and the decisions under that law are that the signature must be at the foot. When a statute is taken from the civil law, we must go to the civil law decisions for authorities concerning it.

MR. LOUGHBOROUGH: The common law decisions are uniform that the name may appear anywhere in the instrument.

THE COURT: Sec. 1277 provides that an olographic will must be "signed;" Sec. 1276, relating to other wills provides that they must be "subscribed at the end thereof;" evidently recognizing a distinction. Even if the word "signed" in Sec. 1277, be taken from the civil law, it is a word known to the common law, and the common law decisions are to be

used in ascertaining its meaning. It is not necessary that the name of the testator be *subscribed at the end* of an olographic will; it is sufficient if the name appear anywhere in the instrument, provided the paper shows on its face that it is complete as a testamentary paper.

Objection overruled.

ESTATE OF EDMUND BROOKS.

No. 7659—Jan. 17, 1878.

WILL.—**UNDUE INFLUENCE** alleged to be exercised by a partner. It must appear that some such influence actually was exercised before the Court can find that the mere fact that a partner is materially benefited by the provisions of a will raises any presumption in that regard.

Quære: Whether instructions of a loose verbal character given to a beneficiary under a will as to the disposition of the bequeathed estate raise the presumption of a trust.

Construing sections, C. C., 1272; C. C. P., 1312-13-17; affirmed, Supreme Court, April 1, 1880.

D. Rogers, for Wm. E. Reid, partner of deceased.

J. M. Kinley, *A. H. Townsend* and *E. D. Sawyer*, for contestant, John Brooks.

By the COURT: The deceased and Reid, the principal legatee, were partners in business in this city, and very close friends for many years up to the death of Brooks. Reid had the principal management of the business, Brooks doing very little of late years except attending auction sales and making purchases for the business. Brooks had for many years been addicted to the excessive use of intoxicating liquors, so much so as to give anxiety to his friends, who took steps to induce a reformation. For ten months prior to September, 1876, he had entirely abstained, but during September and to the date of the will he had returned to his habits. Previous to making the will he sent for his attorney, but as the attorney was absent he sent for Mr. Connor, who had office with the attorney, and who, at Brooks' request, prepared the will according to Brooks' directions. Connor

and Andrus witnessed the will, which was formally executed in all respects as required by law. At the time of executing the will Brooks was of sound and disposing mind, no undue influence was exercised, and it was his own free act. After the will was executed, and within two days, Brooks said to Reid that he would thereafter tell him how he wished him to dispose of some of the estate. Nothing more was said upon that subject until Feb. 6, 1877, when Brooks, being then very ill, said to Reid that he wished then to tell him what disposition he wished him to make of some of the property, and proceeded to do so, which Reid reduced to writing as Brooks gave it, which is as follows:

To John Brooks, brother of the deceased, \$75 per month during his natural life, provided that he should not contest the will;

To Miss Mary Reid, of Baltimore, \$1,000;

To Miss Delavin, the property in Sacramento belonging to Brooks, and \$3,000;

To Miss Jessie Andrus, \$500;

To the Roman Catholic Orphan Asylum of San Francisco, \$500;

To the Protestant Orphan Asylum of San Francisco, \$500;

The water lots held in common with John Shirley to be divided between the children of W. E. Reid, Wm. Develin and the daughter of J. B. Andrus, share and share alike, and his watch, clothing and jewelry to Wm. Falvy.

The following points were made by the contestant:

1—Brooks was not of sound and disposing mind.

2—That the will was made by reason of undue influence exercised by Reid in two ways, viz: that by reason of their relations as co-partners the law presumes undue influence, Reid being a beneficiary under the will, and that Reid actually exercised undue influence over Brooks, and thereby procured the execution of the will.

3—That the will is not the last will and testament of deceased, because at the time of its execution he had in his mind the desire and intention that a disposition of his property should be made other than is expressed in his will.

4—That the verbal instructions given to Reid as to the disposal of a portion of the estate were a portion of his desire as to his property, and not being expressed therein the whole is void.

Upon the question of undue influence, it was distinctly proved that no influence was exercised by Reid over Brooks in inducing the will, and that he gave Reid the bulk of his estate on account of their friendship and because he had confidence in him.

Upon the subject of verbal instructions, Brooks was bound to know that if he wished those instructions to be a part of his will, he should have caused them to be inserted therein. Brooks in person gave the directions as to drafting the will. Reid did not know its contents until he heard it read at the time of its execution, and he was not then advised that Brooks intended to make any disposition other than as expressed in the will. Whether or not there is a trust created by the subsequent verbal instructions does not affect the question under consideration.

The application to revoke the probate of the will is denied.

ESTATE OF C. L. LOW.

No. 7828—Dec., 1877.

EVIDENCE.—HUSBAND AND WIFE.—Wife cannot be questioned as to conversations between herself and husband upon any subject whatever. Such disability as witness is not removed by the death of husband.

WILL, INOFFICIOUS.—UNDUE INFLUENCE by wife excluding a son from will.

ADVANCEMENT TO HEIR in father's lifetime.

CHARGE TO JURY.

Construing sections, C. C., 1272; C. C. P., 1312, 1313, 1317, 1881.

Wilson & Wilson, for proponents.

McAllister & Bergin, for contestants.

During the progress of the trial, while the widow of deceased was being examined as a witness on her own behalf,

it was proposed by her counsel to ask her what conversation, if any, she had with her husband (no one else being present) relating to the will, and the reasons given by him for making no other provision for his son, and to show from his statements to her his feelings towards his son as a foundation for the will.

Objected to.

By the COURT: The objection is sustained. Sec. 1881, C. C. P., is very positive in its terms: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: * * nor can either, [husband or wife] during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage."

The effect of this section is to declare that it is the policy of the law to shut the door upon the family room, and make each secure in the knowledge that their conversation shall not be disclosed without consent. It has been suggested that as one is now dead, that consent cannot be given; very well, the statute has no less force, and the communication is in such case forever sealed. It has also been suggested that the Legislature intended to exclude communications relating to their private relations, their relations as husband and wife, and not to exclude business or general communications. The Legislature has not made the distinction. The language is very plain and comprehensive. "*Any communication.*" That embraces all communications. No Court can positively determine what conversation husband and wife at the time intended as referring to their marital relations; therefore the Legislature has positively prohibited *all* communications.

The Judge thereafter charged the jury as follows:

GENTLEMEN OF THE JURY: Although the testimony has occupied many days in being received and heard, and has covered a long space of time, from 1866 to May 9th, 1877, and has been directed to the domestic relations of more than

one household, yet the bearing of all that is pertinent to this case must be directed to one point and to a limited period of time. That point is the condition of the mind of the deceased, C. L. Low, and the period of time is that of the preparation and execution of this will. The question for consideration is, was undue influence exercised over the mind of C. L. Low, at the time of the execution of this will, and was the will the product of that influence?

I propose to give you the rules of law which are to govern you in your deliberations. By those rules you are bound to be governed. You have no right to substitute your own views of the law in place of the rules given you by the Court; nor have you the right to say that in your opinion this view or that view would be more just or equitable. You will find the facts, but you must take the law from the Court. I shall state to you some portions of the testimony; but of those portions, and of all testimony, and of the facts, you are the sole and exclusive judges.

By the law of this State, every man, being of sound and disposing mind, has a right to dispose by will, in such manner as to him may seem fit, of all of his estate remaining after the payment of his debts. That right is perfect and complete, guaranteed by solemn act of the Legislature. No man need, unless he wishes, consult man, woman or child as to how he shall dispose of his property. He may divide it among his family; he may give it all to his wife; he may give it all to his children; he may give it all to any one or more of his children, and cut off any of the others; he may cut off every child, and give it all to strangers. In that regard his own wishes and judgment are sole and supreme, save as to limit in leaving to corporations. The will is to be *his* will not yours nor mine. In order, however, to preserve that right of disposition, it must not be the product of *undue influence*. Whenever a will is the product of undue influence, it is not *his* will, but expresses the wish of some other person. In order, therefore, to know whether a proposed script is the product of undue influence, we must know what undue influence is.

It is that kind of influence or supremacy of one mind over another by which that other is prevented from acting according to his own wish and judgment. A testator should enjoy full liberty and freedom, in making his will, and possess the power to withstand all contradiction and control. "That degree, therefore, of importunity, of influence, which deprives a testator of his free agency; which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act, is sufficient to invalidate it." "It is only that degree of influence which deprives the testator of his free agency, and makes the will more the act of others than of himself, which will avoid it." It is not to be supposed that courts will adopt any such view of the law as will virtually deprive the testator of the right of disinheriting his children even, upon any grounds satisfactory to himself. "Neither advice, nor argument, nor persuasion, would vitiate a will made freely, and from conviction, though such will might not have been made but for such advice and persuasion." The influence which shall deprive one of the testamentary power must go to the extent of destroying free agency. "Undue influence must not be such as arises from the influence of gratitude, affection, or esteem; but it must be the *control* of another will over that of the testator, whose faculties have been so impaired as to submit to that control, so that he has ceased to be a free agent, and has quite succumbed to the power of the controlling will."

Pressure of whatever character, if so exerted as to overpower the volition without convincing the judgment, is a species of constraint under which no valid will can be made.

Undue influence may be defined as that which compels the testator to do that which is against his will, through fear, or the desire of peace or some feeling which he is unable to resist, and but for which the will would not have been made as it was.

The testator may have known what he was about when he made the will, and may have had sufficient capacity to make it; this may all be true, and still, if his mind were not free to act, if it was constrained to act, or if it had become submissive to the will of another who then exercised a com-

manding control over the testator by reason of which freedom of thought and action in making the will was suppressed; under such circumstances the will should be declared invalid.

In all cases of this kind the validity of the will depends more upon the abuse of a controlling influence than upon the fact of its existence, more upon the fact that the testator was not fairly dealt with, and not left free to pursue his own natural and healthful instincts and reasonable duties, than that the legatee benefited by the will had the power to control such will.

It need not be proved that there was an actual exercise of influence at the point of time the will was executed. Influence at any time, the effect of which was to produce the will without the fair concurrence of the mind of the testator, is sufficient to void the will.

Undue influence can rarely be proved by direct and positive testimony. It may be inferred from the nature of the transaction, from the true state of the testator's affections, from groundless suspicions against members of his family, if any such have been proved; and from all of the surrounding circumstances.

The question before the jury in this case is, whether the will in controversy here was the free act of Charles L. Low deceased or was the result of undue influence exercised by his wife Susan M. Low.

Undue influence, must be an influence, which overcomes the will or controls the judgment of the testator.

The influence which vitiates a will, must amount to force and coercion destroying free agency; it must not be the influence of gratitude, affection or esteem; it must not be the mere desire of gratifying the wishes of another—it must be the ascendancy of another will over that of the testator.

The exercise of undue influence must be upon the very act of making the will, and must be proved and cannot be inferred from opportunity and interest.

A man has a right to make whatever disposition of his property he chooses, however absurd or unjust; if he has the capacity and free volition, his will must stand.

It is not sufficient to set aside a will, that the testator has made an unequal disposition of his property by reason of a partiality resulting from the kind and devoted attention of those to whom he bequeaths it.

A wife cannot be denied the place accorded to her in her husband's will, because it was due to the influence which she acquired over him by her good qualities and kind attentions in his lifetime, if she has not unduly exercised it.

A will can not be set aside because it is the result of an undue fondness for some member of the testator's family or of a causeless dislike to another.

It is not the province of the Court or jury to determine which of a man's relations or kindred is best entitled to his regard or should be preferred in his will. Within that circle the law does not measure the strength of the affections nor determine how much may be justly accorded to their demands.

No influence can be considered an undue influence which does not overpower the inclinations and judgment of the testator, and induce a disposition of his property contrary to his own wishes and desires.

Undue influence cannot be presumed, and the burden of proving it lies on the party alleging it.

Upon the evidence introduced in this case, Mrs. Susan M. Low was the wife of Charles L. Low at the time of his decease.

As such wife she was by law entitled to one-half of all the property acquired by him after their marriage; and the said Charles L. Low only had power to will one-half of the property.

The jury cannot take notice of any evidence offered and ruled out by the Court—their verdict must be based upon the evidence admitted by the Court.

The jury cannot draw any inferences from the rejection of evidence, nor can it be conjectured by the jury what the evidence would have been had it been introduced.

Now, gentlemen, you will apply these principles to the testimony in this case.

Before this will can be set aside, you must believe and find, that at the time of the execution of the will, the mind of C. L. Low was so under the control and influence of his wife, Mrs. Low, or of some other person, that he could not, if he had wished, have made a will different from this; you must believe that he had not sufficient strength of mind to resist such influence.

You may put to yourself such questions as these: Could Mr. Low at the time he made this will fairly and rationally consider those bound to him by ties of blood and of affinity; his son, his daughter-in-law, his grandchildren, and his other relations? Could he fairly and rationally consider and determine, for himself, the persons to whom he wished his estate to go? Could he fairly and rationally estimate the claims of his son and his grandchildren to an inheritance?

If Mr. Low had wished to make other or further provision for his son or grandchildren, had he sufficient control of his own mind and judgment, when the instructions for preparing this will were given, to have given instructions for such other or further provision? At the time that the will was executed, had he the judgment to say for himself how he wished to dispose of his property? When Messrs. Wilson and Wilson were with C. L. Low, on the evening of May 8th, 1877, and the reading and consideration of the will and its provisions were being had, did he give direction as to a change then to be made; and had he then sufficient control of himself to determine whether he wished that his son C. A. Low should have any of his property other than that referred to in his will? If he had wished his son to have more, could he then have given direction to have further provision inserted in the will? If he had wished to make provision for his grandchildren, could he have done so? Again, a few minutes later, when the witnesses were there, and signing and witnessing of the will were proceeding, and he was asked if that was his will, had he sufficient strength of mind, free from control, to declare whether or not that was his will? You are instructed, gentlemen, that what we call the

formal execution of the will, viz: signing, declaring and witnessing, is full and complete; and you have but to pass upon the free exercise of the judgments, opinions and wishes of the testator.

If you believe that Mr. Low gave the instructions to his attorney for the preparation of the will, that it was prepared according to those instructions, that he directed the additions to be made, that when he read it and heard it he understood its provisions, and that its provisions were according to his wishes, that at these times and when the will was executed, he had sufficient strength of mind and control of his own faculties to determine for himself that this will disposes of his property as he wished, and that he could, if he had wished, make any other disposition, you need not go any further in your investigations, but may at once return your verdict; for, if that be your belief, it does not concern you whether or no C. A. Low has a proper share of the estate, whether or no his father had made advances to him, whether or no he was amply provided for, whether or no C. L. Low loved the grandchildren, whether he married Mrs. Low early or late, whether he had affection for her or no, whether she was faithful to him or no; because, all these matters were for him to determine, and his judgment is binding upon us.

But, if you have doubts upon this subject, then you will consider the relation of the parties, and the testimony relating to them, to see whether he was so under the influence and control of any other person that he could not make a will according to his own wishes.

Was there a reason in the mind of C. L. Low, sufficient in his judgment for him to give to his son no more of the property than is provided for in this will?

You will observe that about the year 1871 there was a difference of opinion between the father and son as to a partnership and as to transactions thereof. They made a settlement; and whether there was a partnership and what were its transactions does not concern you; the parties settled those matters themselves. Subsequently, the title to the Niantic property being in C. A. Low, the father owing

him \$50,000 arising out of the Kearny street property, a deed of the Niantic property from the son to the father was deposited in escrow with the First National Gold Bank and Trust Company, to be delivered by the Trust Company to C. L. Low upon his paying \$50,000. An escrow may be defined to be a deposit of something by one person in the hands of another, to be delivered to a third upon the performance by that third person of some act. Therefore, the legal effect of the deposit by C. A. Low of this deed in escrow, to be delivered to C. L. Low upon the payment of \$50,000, was to place the deed beyond the control of C. A. Low, with no right on his part to retake it without the consent of his father except on legal proceedings to terminate the escrow. It is in evidence that C. A. Low did retake the deed without notice to or the consent of his father, and place it in the Bank of California as security for his own debt of \$6,000. C. L. Low was not informed of this transaction until about the time when he was preparing to execute his will. You are instructed that the degree of criticism which was to be made and the importance of that act to their relations as father and son, were for the father to determine for himself, so far as his conduct was to be governed by it.

Again, as to the amount of advances. The question is not, whether the son thought those advances sufficient, or whether you think them sufficient; but, rather, what did C. L. Low think of it? Did *he* deem them sufficient? Were they as much as he wished to make?

You are not here to determine whether you would have made a will such as this is, but you are to determine by the effect of your verdict whether this will expresses the wishes of Mr. C. L. Low, or whether he was a pliant instrument in the hands of some other person, so that he did not and could not express his own wishes.

ESTATE OF ADAM SWEIGERT.

No. 6484—April 26, 1878.

DISTRIBUTION. — BEFORE DISTRIBUTION, ALL CLAIMS BY EXECUTOR MUST BE PAID. —

EXECUTOR MUST RESORT TO ESTATE FOR PAYMENT OF BALANCE IN HIS FAVOR. —

CANNOT HAVE DISTRIBUTION AND RETAIN A LIEN.

Executor asks that distribution be had to widow and minor child, subject to his lien for balance due him, widow and guardian of minor consenting. Application denied, for the reason that the guardian cannot encumber the estate of his ward for any purpose; and this Court has no authority to distribute without such consent.

Construing section, C. C. P., 1665.

George & Loughborough, for executor.*Edw. J. Pringle*, for infant.

The account has been settled, showing a balance due the executor of \$1,700. There is no personal property remaining; there is real estate, but the parties in interest do not desire to make a sale if it can be avoided. The heirs are, the widow and a minor child under guardianship. The executor asks that the estate be distributed, subject to a lien upon each share for its proportion of the amount due the executor. The widow consents, and the guardian of the infant is ready to consent.

By the COURT: The guardian cannot consent. He cannot mortgage or create a lien directly; he cannot do indirectly what he cannot do directly. The object of administration is to pay the debts and expenses, and distribute the residue. The executor must, before distribution, pay all balances or discharge them. If the distributees were all adults, they could consent, and estop themselves from afterwards denying it—but the guardian cannot consent. This Court has no power to create the lien asked for upon the minor's share.

Application denied.

ESTATE OF A. O. OSGOOD.

No. 7997—1878.

SALE OF REAL ESTATE.—SUFFICIENCY OF NOTICE.—When a sale is set for twelve o'clock noon, July 10th, and the first publication of the notice is made June 19th, the last being July 9th, the publication, as of twenty-one days, is sufficient.

Construing sections, C. C. P., 1547, 1554.

J. H. Brewer, for administrator.

W. A. Plunkett, for purchaser.

This is an application for re-sale of real estate, under Sec. 1554, C. C. P., the purchaser having declined to complete the purchase, to the end that he may be charged with any deficiency that may arise. The purchaser objects to the order for re-sale, on the ground that the notice given under Sec. 1547, C. C. P., was not sufficient, and that he would have taken no title, and that he was not bound to complete the purchase.

It was conceded that an administrator is bound to conduct his proceedings for a probate sale correctly, and that a purchaser may criticise the correctness of the proceedings.

The sale was at public auction. The first publication of the notice of sale was made June 19, 1878, for the sale to take place July 10, 1878, at 12 o'clock, noon, and was published every day to and including July 10th, being twenty-two publications in all.

By the COURT: The three weeks for which publication is required to be made commenced at 12 o'clock, midnight, between June 18th and 19th, and expired at midnight between July 9th and July 10th. That gives twenty-one publications (three weeks) before the day of sale. The publication of July 9th completed the publication, and that of July 10th was surplus.

Order for re-sale granted.

ESTATE OF O'KEEFE.

January, 1878.

WILL.—MENTAL INCAPACITY ARISING FROM ALCOHOLISM.—EXPERTS, OPINIONS OF.—
CHAROE TO JURY.

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The opinions of medical experts as to the condition of a given man's mind are often unsatisfactory. The opinions are to be received with distrust and many allowances, for the reason that, while an expert in exact sciences or in mechanics has tangible or ascertainable facts whereon to base his opinion, those scientists who profess to understand the quality or emotions of the human mind have, in great part, to rely upon mere conjectures for their inductions, which inductions are often warped or fitted to pet theories or prejudices.

SANTA CLARA COUNTY, PROBATE COURT,
M. H. MYRICK, presiding.

D. M. Delmas and Hall McAllister, for proponents.

F. A. Spencer, for contestants.

The contest was made on the ground of unsoundness of mind, the result of long continued intoxication. Various medical witnesses were examined upon either side; hypothetical questions were put to them, and replies were received. Referring to the testimony of these experts, the Court instructed the jury:

The testimony of experts is frequently unsatisfactory and many times unreliable. It is unsatisfactory because it cannot convey to our minds the precise reasons why the conclusions are reached; and it is unreliable because it is frequently based upon speculation instead of facts. Experts in the exact sciences and in mechanics, who base their opinions upon the laws of nature and of the exact sciences and their own experience with those laws, have tangible facts before them; but where the opinions are based upon speculation, where the subject of the inquiry, viz: the operation and condition of the human mind, is beyond the possibility of human knowledge, we should receive those opinions as at least uncertain. So, when we see a person perform such or such an act, we can form an opinion whether the act is rational or irrational, whether it is consistent with the standard of average human intelligence and reasonableness; but when we

advance to speculations upon what would or not follow upon some supposed existence of mental condition, we go beyond the scope of knowledge and tread upon the realms of imagination or conjecture.

You are instructed, therefore, that while we receive, and you will take into consideration, the opinions of experts, such opinions are not entitled to as much weight as facts, especially where there is a conflict between an opinion and a fact. When a fact is established, it is a fact, and cannot be overcome; while an opinion is but an opinion, and may be true and it may be untrue. Opinions of different experts are often diametrically opposed to each other, even when based upon the same supposed condition of things.

ESTATE OF BERNARD BURNS.

No. 7476—Jan. 17, 1878.

HOMESTEAD.—WIDOW, SOLE MEMBER OF FAMILY.—UNIMPROVED LOT.—ACCOUNT.—NON-RESIDENTS.—NOTICE.

The widow, (who was also administratrix), applied January 26, 1877, to the Court, and had allotted to her, as a homestead, a lot of unimproved land worth less than \$4,000, which had never been used as a residence, there being no children; and the heirs, brothers and sisters of deceased, non-residents.

Subsequently, July 16, 1877, a non-resident sister of deceased applied to have the order vacated. The application was denied.

Thereafter, the non-resident heirs applied to have the homestead property, which was the only real estate of decedent, and was claimed by them to be separate estate, included in the accounting of the administratrix. This was also denied, the heirs not making any showing of additional receipts by administratrix.

Construing section, C. C. P. 1465; affirmed, January Session, 1880.

M. C. Hassett, for widow.

F. A. Berlin, for heirs.

The widow, Lizzie Burns (she being also administratrix), filed her petition January 19th, 1877, asking that a parcel of land, valued in the inventory and appraisement at \$3,500, be set apart to her as a homestead, alleging that decedent, in his lifetime (he died Dec. 8th, 1876), had not selected and recorded any homestead.

On the 26th of January, 1877, the Court entered a decree finding that notice of the hearing on the petition had been given; that the family of the deceased consisted only of the widow; that she had no separate estate of her own; and that the parcel of land in question did not exceed \$4,000 in value; and set the same apart to the use of the widow, the same not to be subject to further administration. The parcel constituted all decedent's real estate.

On the 14th of July, 1877, Ann Gordon, a sister of decedent, and one of the heirs to his estate, non-resident, filed a petition setting forth that the property set apart to the widow was his separate estate; that the lot had never been improved or used as a residence by deceased, who resided in another part of the city; that all the heirs of deceased, save the widow, were non-residents; and by reason thereof, had no notice whatever of the application; that no attorney was appointed to represent them at the hearing; that the widow was not head of a family and therefore was not entitled to a \$5,000 homestead; and further, alleging that the Court could not have known, at the hearing, the true status of the property.

Petitioner asked, therefore, that the decree allotting the homestead should be vacated.

The widow demurred to the petition on the ground that after making the order, the Court lost jurisdiction; and that no appeal had been taken;

That the motion to vacate had not been made within the time prescribed;

That the homestead having once been set aside, it was not subject to further administration.

The demurrer was sustained, for that, the petition of Ann Gordon to vacate the homestead decree did not state facts sufficient to entitle the petitioner to the relief prayed.

On the 17th of January, 1878, the non-resident heirs filed a petition setting forth the facts of administration; the settlement of an account; the distribution of personalty; and asking that the homestead, as separate estate of decedent, be included in the accounts of administratrix and be made subject to distribution, the same not being proper subject

of a homestead decree; also, that widow render further account of personalty.

The Court declined to compel the administratrix to file any additional account as to personalty (unless the heirs could show further receipts by the administratrix), or to disturb the homestead proceeding; and on motion for a new trial, the same was denied.

ESTATE OF J. B. WHITE.

No. 8315—March 6, 1878.

WILL, CONDITIONAL, TO BE VALID IN CASE OF DEATH ON A PARTICULAR VOYAGE, A NULLITY ON RETURNING THEREFROM.

A will which recites projected voyage and "in case of death while performing the journey," makes certain disposition of property, becomes a nullity on the safe return of testator.

Construing section, C. C., 1281.

Sol. A. Sharp, for administrator.

P. B. Ladd, for proponent.

A paper was offered for probate, reading as follows:

"SAN FRANCISCO, November 13, 1876.

"I am about to sail for China and Japan on the 16th inst., and in case of my death while performing the journey I desire the following disposition of my estate to be made," &c., &c.

Deceased returned from the voyage indicated in the paper, and (being in the employ of a steamship company) made other voyages. He died on board his ship in the harbor of San Francisco.

By the COURT: The will was conditional, (1 Redf. on Wills, 177-9, ed. of 1869,) and was made of no effect by the return of the deceased from the voyage indicated. Probate of the will must therefore be denied.

ESTATE OF J. P. RICAUD.

No. 7754—Aug. 23, 1877.

COSTS.—In case of costs for any purpose other than the charges of officers appointed by the Court, a cost bill should be filed as in civil cases.

HOMESTEAD.—On setting aside homestead, the fees of appraisers, reporters, and interpreter are payable by executor out of estate.

Construing sections, C. C. P., 1033, 1485.

March 6, 1878.

PARTIAL DISTRIBUTION.—**COMMUNITY PROPERTY.**—Widow entitled to apply for the same as if she were an heir, notwithstanding the fact that her title is not that of an heir, but was vested in her during her husband's lifetime.

HEIR includes widow or survivor, when the word is used touching distribution.

Construing section, C. C. P., 1658.

Jarboe & Harrison, for executors.

A. P. Needles and *H. A. Powell*, for the widow.

The widow heretofore applied for family allowance and homestead, which was resisted by the executors and granted by the Court. She now applies to have all the expenses paid out of the estate.

By the COURT: The fees of the appraisers, reporter and interpreter will be paid by the executors, they being officers of the Court. As to the other costs, the statute requires a cost bill to be filed within five days after the judgment. No cost bill was filed within that time, therefore payment thereof is denied.

March 6, 1878.

By the COURT: The widow of deceased applies under Sec. 1658, C. C. P., for distribution to her of a share of the estate. It is objected by the executors that the widow is not an heir within the meaning of that section. It is true that she is not an heir in the strict sense of the word; during the life of the husband she has an interest in the community property, her enjoyment thereof depending upon the death of the husband. Upon his death she receives no property in the way of heirship; she simply receives title to

what was hers. But I am of opinion that the Legislature, by the use of the words "heir, devisee or legatee," did not intend to use the words in the strict technical sense, but in the larger sense of including all who succeed to or have the estate. A purchaser from an heir is not an heir or devisee; yet I see no objection to his having partial distribution. In many sections of the Code the word "heir" is used in such connection that it must be held to include the widow, or the Code would be largely inoperative. In Sec. 1675 provision is made for partition between "heirs, devisees or legatees"; if the widow is not necessarily intended to be within these words, it would follow that there could be no partition of community property.

I am of opinion that a widow can have partial distribution the same as can an heir, devisee or legatee. The objections are overruled.

ESTATE OF WILLIAM L. DALL.

No. 2802—March 6, 1878.

DECREE OF DISTRIBUTION CONCLUSIVE UPON THE RIGHTS OF CREDITORS.

Application being made by distributee for the payment to her of balance of estate, under a decree of distribution, certain alleged non-resident creditors ask to be heard, as claimants upon the fund.

HELD, that the decree of distribution is a finality as to all the creditors of an estate.

Construing sections, C. C. P., 1493, 1650.

S. V. Smith & Son, for executor.

Pratt & Metcalfe, for creditor.

Application being now made for the payment of the balance of the estate to Susan Dall, request is made by L. E. Pratt, Esq., attorney for certain non-resident alleged creditors of said deceased, that the hearing be postponed, and that said alleged creditors have an opportunity for presenting their claims; which is resisted, upon the ground that the decree of August 11, 1868, is in effect a decree of distribution of the estate, and that it is now too late for a creditor to present his claim.

By the COURT: I am of opinion that the decree of August 11, 1868, was final and conclusive, determining the rights of the distributees, and that no creditor has now a right to present a claim. From and after a decree of distribution, the property no longer belongs to the estate of the deceased, but is the property of the distributees therein named, and their successors, and remains in the hands of the executors for the purposes stated in the decree only. For that reason, the motion to postpone is denied, and the executor is entitled to his order as prayed for.

ESTATE OF R. D. TAYLOR.

No. 4802—March 9, 1878.

CONTEMPT, FINDING OF, JUDGMENT OF IMPRISONMENT OF EXECUTOR, until he makes payment of the distributed shares of the estate.

Construing sections, C. C. P., 1209, 1721.

Burch & Griffith, for distributees.

R. H. Lloyd and *J. M. Allen*, for executors.

By the COURT: By decree of this Court made February 21, 1876, (after due proceedings thereto had,) it was determined that there was a balance of \$3,504.29 belonging to said estate in the hands of William Smith and Robert S. Smith, executors of the will of deceased, and the same was by said decree distributed and ordered to be paid as follows: To John Drummond two-sevenths; to Margaret Drummond Maury two-sevenths; to Agnes Drummond Haas two-sevenths; and to Janet Duncan one-seventh. The executors appealed from said decree to the Supreme Court, and upon such appeal the Supreme Court directed the decree to be modified so as to omit \$394 of the balance so found and distributed. The remittitur was filed in this Court Jan. 12, 1878. Jan. 28, 1878, after due notice to the executors, this Court modified the decree as directed by the Supreme Court, and found the balance then due from the executors to be \$3,464.65, (certain additions being made to the former

amount for interest since the date of the first decree,) and by its decree made distribution thereof to the persons and in the proportion named in the first decree.

Proceedings were thereupon had to punish said executors for contempt of this Court in not paying over said money in accordance with said decree, and citation was duly issued to them and served upon William Smith, one of the executors, who appeared on the return day, and the proofs of the respective parties were heard. From the evidence the Court finds as facts:

At the time of the decree of February 21, 1876, the funds of the estate were mingled with the funds of a firm of which the executor William Smith was a member, being used in the business of the firm; that he had control of the funds, and that he then had ability to pay each and all of the sums distributed; that he paid no part nor any of said distributed shares, and that he has not to this day made any payment thereof, nor has any other person; that said executors did not separate the funds of the estate, but permitted them to remain in the business of said Wm. Smith and his partner. Upon the hearing of the application now under consideration, said William Smith testified that pending the appeal in the Supreme Court his firm became involved and its property, together with the assets of said estate, was attached by creditors of the firm and still remains under seizure; that he has no individual real estate and no personal property of much value; that he has an income of \$200 per month, and has a family to support.

From the foregoing facts the conclusions of law are: That no sufficient reason appears why the order for payment has not been complied with. It was the duty of each of the executors, under the decree of February 21, 1876, to make payment to the distributees of their respective shares, less the said sum of \$394, and a reasonable sum for costs and expenses. It was their duty to have segregated the funds of the estate from the funds of the firm of Wm. Smith and his partner. If the funds of the estate have become so complicated with the firm as to have no ear-mark by which they can be designated and reached for distribution and payment,

the executors alone are responsible. Upon the making of the decree of January 28, 1878, it was the duty of the executors to forthwith make payment as therein directed. It does not appear that it is entirely beyond the power of the executors to make the payments. They make no offer to have their assets marshalled, or to do any act; Wm. Smith does not offer to have any portion of his income applied. Even if the executors are now unable to pay, their own wrongful acts have caused such inability.

It is adjudged that each of said executors is guilty of contempt of this Court in not paying to said distributees the sums which should be paid to them respectively; and it is ordered that said Wm. Smith be imprisoned until he shall make said payments or until he be discharged according to law.

Let a decree be made and a warrant of commitment issued.

GUARDIANSHIP OF MARIA MOHLENHAUER.

No. 2349—March 20, 1878.

SUPPORT OF A MINOR WARD.—Where a guardian possessed of means of his own, marries a minor's mother, who has separate estate, the support of the minor may be apportioned as a burthen upon the estate of the three persons, the apportionment to be regulated by the sound discretion of the Court.

Construing section, C. C., 209.

Gray & Brandon, for guardian.

E. D. Sawyer, for minor heir.

This is a settlement of the accounts of the guardian for 9 years and 11 months to Jan. 1, 1878. It was found that the compensation of the guardian for the care and management of the estate should be \$1,500. The other question is as to compensation for support and education. The guar-

NOTE.—A warrant of commitment was issued and the party lodged in jail. He thereupon sued out a writ of *habeas corpus* from the Supreme Court. Upon the return of the writ the matter was heard before the Court, and the writ dismissed and the party remanded.

Ex parte Wm. Smith, 53 Cal., 204.

dian charges \$75 per month for the period. Both the ward and her mother derived a considerable estate from the father of the ward, which yields income, and the guardian has married the mother, and has property and income of his own. Four children have been born of this last marriage, and all reside together. The ward, now seventeen years of age, requests that the guardian be allowed the sum asked by him. The guardian has treated the ward kindly, and educated her according to her condition in life.

By the COURT: There are three sources from which the minor's support may come, viz: the resources of the step-father, of the mother, and of her own property. Under the circumstances of this case, the burden should be divided. Let \$25 per month be paid out of the estate of the ward.

ESTATE OF C. B. MARVIN.

No. 4138—April 11, 1876.

ATTORNEY FEES.—PAYABLE BY THE ADMINISTRATOR IN CHARGE OF THE ESTATE, THOUGH INCURRED BY AN EXECUTOR WHO HAS VACATED HIS TRUST.

When attorneys render services to an estate at the instance of an executor, who thereafter resigns, and is succeeded by an administrator, such attorneys are entitled to be paid for their services out of the estate notwithstanding the fact that such executor has not reported the item in any account.

The attorneys cannot be expected to rely wholly on the personal security of the executor, when the estate has had the benefit of their services.

March 7, 1878.

COMMISSIONS.—SUCCESSIVE ADMINISTRATIONS.—FULL COMMISSIONS NOT ALLOWABLE UNTIL CLOSE OF ADMINISTRATION.

Property received from a former executor, on which such executor has been paid commissions, must not be included in estate administered, as a basis of calculation.

Full commissions are not allowable until distribution can be decreed.

March 23, 1878.

EXECUTOR'S COMMISSIONS ON PROPERTY PARTITIONED IN DISTRICT COURT ALLOWABLE ONLY ON NET BALANCE OF SALE IN PARTITION.

Where an undivided interest in lands subject to a mortgage has been set off to the estate in the District Court, and the tract sold to complete the partition and satisfy the mortgage, it is only on the estate's interest in the surplus, that the executor's commissions can be charged.

DEVISE.—A DEVISE POSTPONING DISTRIBUTION, BUT NOT CREATING A TRUST.

Where the language of a will seems to contemplate merely a deferred distribution until the majority of the youngest child, and to create no trust other than executorship, the Court will not distribute the estate and part with the control of it until the designated time shall have arrived.

Construing sections, C. C. P., 1616, 1618.

Parker & Roche, in person.

D. P. Barstow, for administrator.

By the COURT: While the executor of the will of testator was in office, he employed Messrs. Parker & Roche, attorneys, to render professional services in and about the management of the estate, and services were rendered. Subsequently, the executor resigned, and an administrator has been appointed. The attorneys now apply for an order that the administrator pay their fees. It is objected by the administrator, that the Court has no power to make the order; that the attorneys must look to the former executor, and that the Court has only the power to allow the amount in the account of the executor, after payment by him.

I do not concur in this view. The administration of an estate is an entirety, and when services of any kind are rendered in and about the proper business of the estate, the person rendering services may have his pay from the administrator in office. The Court has power to compel the administrator to pay; otherwise the person rendering services may be quite at the mercy of the administrator employing him, or be compelled to sue him, and if he be insolvent, lose the amount due, while the estate would enjoy the results.

The Court will hear proofs as to the services rendered and the amount to be paid.

March 7, 1878.

W. W. Crane, Jr., for administrator.

F. W. Tompkins, for legatees.

Upon the settlement of the account of the administrator, objections were made as to commissions charged therein.

Of the cash received by the present administrator, \$30,-621 were received from the late executor; the same is not a basis for charging commissions.

The value of the property sold by the order of the 19th District Court, in proceedings for partition, is not property accounted for by the administrator in this Court, and cannot bear commissions. The value of the interest of the estate in the property sold, is the property accounted for as administrator.

Full commissions cannot be allowed until the estate shall be ready for distribution. If, before distribution, the administrator wishes to have commissions upon the moneys actually received by him, to the end that he may have credit therefor, he can have the same, and, doubtless, an allowance on the value of the real estate, properly apportioned.

By the COURT: It is doubtful if this estate can be distributed before the youngest child shall attain twenty-one years of age. If, however, a distribution can be had as soon as a trustee shall be appointed, the proper course to pursue in computing commissions will be, to wait until the estate shall be ready for distribution, then compute the amount of entire commissions on the whole estate, from that amount deduct the amount allowed to the executor, and allow the balance to the present administrator, if he shall till then continue in office. If the estate cannot, under the will, be prepared for speedy distribution, commissions may now be computed and allowed as follows: compute commissions on the entire receipts of money, deduct the amount allowed to the executor, and allow the balance to the administrator, adding thereto a proper proportion on the value of the real estate.

March 23, 1878.

Questions occurring on the settlement of the account of the administrator have been re-argued.

1. The ruling of the Court that commissions cannot be allowed on the item of \$30,621, receipted for by Mrs. Heaton, is admitted to be correct.

2. Commissions are claimed on the sum of \$25,000 included in the account. Deceased and Waterman purchased a parcel of real estate, which was then subject to a mortgage. Proceedings in partition were had in a District Court, and that Court, in partition, ordered the premises sold, the mortgage debt to be paid, and the surplus to be divided between Waterman and the estate. The administrator can have commissions upon the estate's share of the surplus only. The property, to the extent of the mortgage debt, was by order of the District Court taken out of the estate and never was "accounted for" by the administrator in such manner as to entitle him to commissions.

3. The administrator desires that his account may be treated as a final account, and that distribution of the estate be made as soon as a trustee may be appointed by the proper Court. He claims that the estate has been fully administered as to all purposes of the probate law, and that a trustee should have all future care of the property; and as incident to the present distribution, he is entitled to full commissions, less the amount heretofore allowed to his predecessor. The clauses of the will upon which this question turns are as follows:

"Sixth—I do give, devise and bequeath unto my wife Ellen C. Marvin one-third part of all my estate, &c.

"Seventh—I do give, devise, and bequeath unto my children * * all the residue of my estate.

"Eighth—In view of the youth of my children, and of the fact that my estate is largely encumbered, and that if it remains undisturbed and the revenues of the estate be applied to the removal of said encumbrances, the interests of my wife and children would be thereby served and advanced, I have decided, and do so will and direct, that my estate, both real and personal, remain after my death intact and undisturbed in the hands of my executors hereinafter mentioned, and whom I hereby constitute and appoint trustees for that purpose, until my youngest child shall have arrived at the age of twenty-one years, when a distribution of the estate shall be made as hereinbefore provided; until that time

shall have arrived, it shall be the duty of the executors, out of the rents, issues and profits of said estate, First, to pay the necessary expenses of said estate and of the management thereof; Second, to pay the necessary and proper cost of living for my wife and children, including cost of schools and teachers and books, and other expenses such as are suitable; * * Third, the surplus to be paid in cancellation and extinguishment of the debts, * * * Money accumulating in the hands of the executors shall be invested in the name of and for the benefit of the estate. And for the purposes aforesaid I give to my executors full power to make, execute and deliver all necessary mortgages and notes or renewals of notes and mortgages now existing. And should it become necessary or should it be deemed necessary or extremely desirable to sell any portion of the real estate, I direct that it be so sold; the consent and approval of the Probate Court first having been obtained."

By the COURT: Lands in Missouri and Iowa may be sold without approval of Probate Court.

The usual administration has been had, the debts paid, and the estate is now ready for final settlement and distribution unless such distribution is prevented by the will. The youngest child is now about ten years of age.

I am of opinion that no trust is created by this will, other than the usual trust of executorship; that the powers conferred are conferred to be attached to the office of executor; that upon the death of testator the title passed to the devisees without the intervention of a trustee, and that the testator intended the estate to remain in the Probate Court under administration until the youngest child shall attain the age of twenty-one years. It is true that the word "trustee" is used, but taking the above clauses together, it is clear that no other trust was intended than that of executorship. The action of the Probate Court is necessary to a sale in this State, which can be had while the estate remains here; but if the estate should be distributed, the Probate Court would have no supervision of a trustee, and the clause of the will relating to the Probate Court would be nugatory;

the testator cannot invest the Probate Court with jurisdiction over a trust.

As indicated in the former opinion, commissions may now be computed and allowed as follows: compute commissions on the entire receipts of money, deduct therefrom the amount allowed to the executor, and allow the balance to the administrator, adding thereto a proportion of the value of the real estate, viz: for the time from the probate of the will to the present time.

Let the account be re-stated in accordance with this opinion, and let an order be thereupon made, stating balance and settling the account.

ESTATE OF WM. STOTT.

No. 2292—July 26, 1875.

CONVICT under a sentence for life imprisonment civilly dead. Wife in such case is a widow and entitled to take as legatee or devisee where her widowhood is a condition for vesting a legacy or devise.

January 24, 1876.

INTEREST.—COMPOUNDED WITH ANNUAL RESTS.—EXECUTOR CHARGEABLE WITH, if he mingles estate's funds with his own in his business house.

April 30, 1878.

ATTORNEY'S FEE.—WHEN DISALLOWED.—INCURRED BY EXECUTOR IN HIS OWN BEHALF IN LITIGATING A CONFLICT WITH ESTATE.

An executor is not allowed attorney's fees incurred by him in litigation instituted by him for the protection of his own interests when in conflict with those of the estate.

Construing sections, C. C., 2236-7; C. C. P., 1616; Penal C., 674.

G. B. Merrill, for executor.

Phelan & LeBreton, for Mrs. King.

The will of deceased contains the following provision:

“It is my will and I give and bequeath and devise to my daughter Anna, five hundred dollars only while she remains the wife of her husband; but in case she should become a widow, it is my will and I hereby devise and bequeath to her

my entire estate, real, personal, and mixed, and in case she should decease while her husband is living, it is my will, and I hereby give, devise, and bequeath my entire estate, real, personal, and mixed, * * to my brothers and sisters," etc.

The daughter, Mrs. Anna King, petitions for distribution to her of the entire estate, upon the following facts:

At the time the will was made, Anna was the wife of James C. King. In 1874, King was convicted of manslaughter in the State of New York, and was sentenced to the State Prison of that State at Sing Sing for life, where he still remains under that sentence. King was, and his wife has been ever since, and still is domiciled in New York. The statute of New York contains the provision that "a person sentenced to imprisonment in a State prison for life shall thereafter be civilly dead;" and by the law of that State it is not bigamy for a woman to marry again after her husband has been sentenced to the State prison for life, nor does a pardon restore him to marital rights.

Counsel have not been able to refer to any decision directly upon facts similar to the case at bar, but some few decisions have been cited upon points having analogy, such as, that when a man becomes civilly dead, his property goes to his heirs, and a subsequent pardon does not restore it; a pardon does not revive the old rights, but gives him new ones; the sentence dissolves the marriage relation. I have, therefore, to ascertain, as nearly as I may from the will, the intention of the testator, and carry out that intention so far as the law will permit.

The testator gives to his daughter five hundred dollars only, while she remains the wife of her husband, but should she become a widow, she is to have the entire estate; and if she should decease during the life of her husband, the estate is to go to others.

Two questions present themselves, viz:

1—What is the present status of Mrs. King and of King in New York?

2—Do they respectively occupy the same status elsewhere?

First—It was evidently in the view of the testator to prevent King from having any control over or the right to inherit any of the property bequeathed, beyond the legacy of five hundred dollars. Whether that intention was founded upon ill-will, or upon the supposition that King could provide for his own family, does not appear. Mrs. King was to have five hundred dollars only, while she remained the wife of King; but should she become a widow, she was to have the bulk of the estate. Evidently she is not his wife; but is she a *widow*? Has the contingency arrived which the testator intended? Nearly all the English lexicographers define a *widow* to be, a woman whose husband is dead. The words from which this word is derived, are, *viduus*, bereft, deprived of; *vidua*, a woman bereft of her husband. She certainly is not his wife; he is not her husband; she has been bereft, deprived of, her husband; he is dead to her; he is dead to the State; he has no civil rights; he can make no contracts; he cannot sue or be sued; he cannot inherit property; if he had estate, it is subject to administration; if he had children, he has lost their guardianship, and they owe no duty to him; he has no absolute privilege except the privilege, if it be one, to breathe. It seems to me that under such circumstances, it would be doing no violence to language, and no violence to the testator's intention, to say that she is in every sense a widow.

Second—She being, then, a widow in New York, the place of domicile, is she to be regarded here as a widow?

Story in his work on the Conflict of Laws, Sec. 65, says that the personal capacity or incapacity attached to a party by the law of the place of his domicile, is deemed to exist in every other country, even in relation to transactions in any foreign country. Thus, a minor, a married woman, a prodigal, a spendthrift, a person *non compos mentis*, or any other person, who is deemed incapable of transacting business (*sui juris*) in the place of his or her domicile, will be deemed incapable everywhere, not only as to transactions in the place of his or her domicile, but as to transactions in every other place. A qualification to the rule is, that the incapacity

should not be inconsistent with the policy of the country where the rule is invoked.

So far from the principle that King is civilly dead being contrary to the policy of the law of this State, we have a similar statute applying to similar sentences here.

In my opinion, Mrs. King is entitled under the will to have distribution to her of the estate.

Let a decree be entered accordingly.

January 24, 1876.

The executor has rendered an account, to which Mrs. King has filed exceptions.

After hearing the proofs of the respective parties, the Court finds the following facts:

May 12, 1868, the account of the special administrator was settled, showing a balance of cash in his hands of \$9,652.78; the letters were vacated, and on the same day the executor received that amount from the special administrator. The executor also received the following amounts: Sept. 14, 1868, \$1,037.14; Dec. 1, 1868, \$827. He paid as follows: May 25, 1868, \$6; Oct. 8, 1868, \$200; Nov. 28, 1868, \$324.25; April 26, 1869, \$150; and charged commissions, April 26, 1869, \$554.91.

May 2, 1869, he rendered an account, which contained the foregoing items, and no others, stating the balance to the credit of the estate April 26, 1869, to be \$9,463.03.

Due notice of settlement of this account was given by posting under the statute, and on the 13th May, 1869, this Court made a decree settling the account. In the decree the Court found that the "account contains a just and full account of all moneys received and disbursed by said executor from the 16th day of April, 1868, to the hearing hereof," "or were received by any other person by his order or authority for his use as such executor"; and the Court decreed "that said account be and the same hereby is in all respects as the same was rendered and presented for settlement, approved, allowed, and settled."

The account contained no item for interest, and made no reference to the money having been used. At the foot of the account are the letters "E. & O. E.," which mean, in commercial parlance, errors and omissions excepted. The affidavit of the executor was attached to the account that the account was true and contained a statement of all receipts and disbursements during the period covered by it.

Dec. 7, 1875, the executor rendered the account now undergoing settlement, in which he charges himself as follows:

1869, April 26.	To bal. acct. ren'd this day,	\$9,463.03
1872, July 17.	Am't received of Pacific Guano Co.,	66.15
1872, Sept. 28.	Am't received of E. A. Williams for Phoenix Island, \$4,200 @ 88½ %,	3,717.00
		<hr/> \$13,246.18

The executor credits himself as follows:

1869, Nov. 12.	By am't paid taxes 1869-70,	\$277.20
1870, Oct. 19.	" " " 1870-71,	269.24
1871, Nov. 17.	" " " 1871-72,	281.06
1872, Ap'l 1,	By drawing deed for Phoenix Island	10.00
" " 9.	" acknowledging deed,	5.00
" Dec. 9.	" am't paid A. T. King, drft of self,	657.50
1875, Aug. 17.	" " " Geo. B. Merrill, att'y,	
	Bal. services and retainer in Sup. Ct.	500.00
1875, Aug. 17.	By am't commissions \$3,783.15	
	@ 7 per cent.	151.33
	and states the balance to credit of estate to be	\$11,094.85.

There is no item for interest, and no statement of use in the account.

During all the period covered by these accounts, and for many years prior thereto, the executor was a member of a mercantile house in this city. There have been changes in the firm name and in some of the partners, but the executor always continued a member. The transactions and business of the house have been continuous, notwithstanding the changes in the firm names and in the partners. The house had banking accounts at various banks in this city, in which ac-

counts were deposited moneys received by the house in its business, and checks were drawn upon the banks as the business of the house required. The executor had no individual bank account, but his private funds went into the general bank accounts of the house. All the funds of this estate were, when received by the executor, by him placed in the banks with which the house dealt, in the accounts of the house, and were in no respect kept separate or in any manner indicated in the bank accounts separately from the funds of the house, but were used by the house, through its checks, in the same manner as its own funds. The executor kept no separate individual account; the accounts of the estate were kept in the books of the house; the moneys disbursed on account of the estate were drawn from the banks by the checks of the house. In general, the house had to its credit in its bank accounts, more than the amount of the funds of the estate; on several occasions the balance was less than the amount of the estate funds, and on two occasions in 1874 the accounts were overdrawn, once in \$26,000 and once in \$4,000, but the deficiency was immediately made good. The house had occasion, from time to time, to borrow money temporarily in its business; some of the loans were made at the banks where the accounts were kept, some elsewhere. In loans of large sums, security was given; in loans of inconsiderable amounts, no security was given. The interest paid by the house on these loans varied from nine per cent. per annum to one per cent. per month. The house has at all times been and is a responsible house, of character and standing, able to have forthcoming the funds of the estate when required. The executor, on being examined as a witness, claimed that the funds of the estate had not been used, except temporarily as above stated, prior to April, 1875; but he admitted that in that month the funds of the estate were used by the house in its business in making advances on consignments, and had been so used at various times since, and that he is chargeable with interest since that date.

The legatee, Mrs. King, asks that the executor be charged with interest from May 12, 1868, to this day.

The item of \$500, attorney's fees, is contested. That item is intended to cover fees for services on the demurrer of the executor to the petition of Mrs. King heretofore heard for re-opening the former settlement (which demurrer was sustained) on petition for distribution; for rendering and settling this account; and for retainer in the Supreme Court on an expected appeal from an order. The services on the demurrer and petition were of the value of \$300. The rendering of the account was compelled upon petition of Mrs. King and order of Court, after various antagonistic proceedings were had. Upon the hearing of the account all the services rendered by the attorney have been in regard to matters in the interest of the executor as against the estate. The item of commissions will, of course, be changed to concur with the computation under these findings and the order thereon.

The executor also claimed that in no event can he be charged with interest prior to May 13, 1869, the day of the former settlement; that the settlement of that account was conclusive as to all transactions by the executor.

From the foregoing facts, the conclusions of law are as follows:

First—As to the settlement of the account of May 2, 1869. The settlement of that account was conclusive as to all matters therein contained; but it is not conclusive as to any other matters. In rendering an account an executor challenges attention to such matters only as he places in his account. He has the right, nay, it is his duty, to make a full report of all his transactions. If he fail to do so, he cannot claim any advantage as to the matters omitted. If an executor can (as recently held by the Supreme Court) omit credits and have them subsequently considered, how much more should he be held to account for omissions on the other side. The executor did not report any interest due or received; he did not challenge attention to the question whether or not he had used the funds. In such a case as this, interest is not an incident to the debt, in the ordinary commercial sense, to be considered as settled with the

principal; the law forbids an executor to use funds, and the legatee was not bound to presume or to suppose that he did use them. The decree of the Court was, in terms, settling the account *as it was rendered and presented for settlement*, which, of course, embraces nothing not contained therein. Therefore, the question of interest or use was not passed upon by the settlement of that account, and can be inquired into by surcharging this account.

Second—As to interest. The executor having mingled the funds of the estate with the funds of the house of which he was a member, and having used the same in the business of that house, is chargeable with interest from the dates of receiving the funds to this day, having credit, of course, for the amounts paid for the estate. An executor or an administrator is expected and required to preserve the property of the deceased separate and apart from his own, and by itself to give it, as is said, an ear-mark, that it may always be known and readily traced to any one into whose hands it may happen to fall. As was said in another case, “It was improper and unlawful for the accountant to mix the funds of the estate to any extent with his own. However clear it may be that it was without any dishonest intention of making gain to himself, such a practice ought never to come before a Court without being in some way marked with its disapprobation.” I am aware that many persons honestly believe that if they have funds in hand as executors or administrators, and have given bonds, they are justified in mingling the funds with their own and in using the same, especially if the bonds are ample, and their business and social position are unquestioned, and they are at all times ready to respond. Such belief is not founded upon any rule of law. To the practice of using trust funds is to be attributed in great measure some of the sad wrecks of life and character which we read of in our public journals. Heirs are not bound to wait until the catastrophe of an unfortunate adventure before they can question the right to have the money put to use; it is their due to have their money always ready, separate from other moneys. The Legislature

has made no distinction between persons, in this regard. It holds to the same strictness of account the clerk or secretary who *believes* he can make good the balance, the errand boy who *hopes* he can replace his employer's securities, and the merchant who *knows* that his adventures are safe on ships in the harbor.

The interest should be computed at the rate of seven per cent. per annum to April 4, 1870, and thereafter to the day of settling this account, viz: January 24, 1876, at the rate of ten per cent. per annum, with annual rests as of May 12 of each year, compounding interest yearly as of that day.

Third—As to the item, \$500, attorney's fees; this item is allowed at \$300; the balance is disallowed.

Fourth—The commissions will be computed and allowed upon the entire estate accounted for by the executor, and upon the interest stated herein, deducting the commissions included in the former account.

The following is a statement of the account as settled herein, viz:

Charge to the executor the amounts to his debit	
in his account, - -	\$13,246.18
Interest to Jan. 24, 1876, -	9,883.60
	<hr/>
Total debits, -	\$23,129.78
Credit the executor with the first six items to his	
credit in his account,	\$1,500.00
Commissions due,	553.65
Attorney's fees, - -	300.00
	<hr/>
Total credits, -	\$2,353.65

Showing a balance due from the executor to the estate of \$20,776.13.

And the account is thus settled.

On appeal to the Supreme Court, the judgment of the Probate Court was reversed as to the conclusiveness of the former settlement and affirmed in all other respects.

April 30, 1878.

Upon the hearing of the petition of Anna King for distribution, the executor presented for settlement and allowance a statement in writing, which is filed.

Of the items contained in said statement the following are allowed:

Reporters' fees in Probate Court,	-	\$20 00
Probate Court fees,	-	16 00
May 19, 1876, G. B. Merrill, for demurrer to petition for distribution,		100 00
Supreme Court costs,	-	15 00
		<hr/>
		\$151 00

The item \$15, Supreme Court fees, is allowed on the authority of the remittitur.

All the other items contained in said statement are disallowed (except say \$50 for estimated expenses in closing the estate) for the following reasons:

The item dated May 19, 1876, paid G. B. Merrill for demurrer to petition of Anna King to surcharge account, \$100, has been heretofore passed upon and settled by the opinion of this Court filed January 24, 1876.

The item of \$750 estimated expenses on closing estate, was inserted to cover expenses of a possible appeal from the order of distribution now being asked for. The item \$150, paid by G. B. Merrill April 2, 1878, demurrer to petition for distribution, is for services rendered in resisting this distribution now under consideration. J. C. Merrill as trustee, cannot have his attorneys' fees in this Court. He is in his capacity as trustee the same as any legatee, who must bear his own burdens.

All the other items arose in and about an appeal which J. C. Merrill took from the order of this Court settling his accounts.

This Court had charged him with interest to the amount of \$9,883.60, for using the moneys of the estate. On the appeal the order of this Court was sustained as to all except \$1,211.57 of the interest, which was for his using the moneys

prior to the settling of a former account, and which, the Supreme Court held, was barred by the settlement of that former account. The entire amount which the executor now asks may be allowed to him on that appeal is \$988, including \$250 for hearing the account and preparing the appeal, and \$500 for arguing the case in the Supreme Court.

An executor is entitled to the services and advice of an attorney, at the expense of the estate, as to the proper management of the estate; but he is not entitled to have pay out of the estate for an attorney to advise him that he may apply the moneys of the estate to his own use; nor upon his appeal to the Supreme Court upon that question. The whole controversy upon the appeal was his own individual controversy, adverse to the interests of the estate, and in that controversy it was J. C. Merrill who was the litigant, not J. C. Merrill, executor. Of the \$9,883.60, which this Court had charged him for using the money of the estate, the Supreme Court affirmed \$8,672.03; holding that this Court had erred as to \$1,211.57; not because he had not used the money, but because this Court could not go behind a former settlement and charge him for using prior to the date of the former account.

ESTATE AND GUARDIANSHIP OF MARION MEYER.

No. 6953—May, 1878.

HUSBAND'S LIABILITY FOR WIFE'S SUPPORT.

It is the husband's primary duty to support his insane wife, notwithstanding the fact that she has abundant estate of her own. It is only when the husband is unable to support his wife that resort can be had for her maintenance to her separate estate.

Construing section, C. C., 174.

George & Loughborough, for the husband.

The wife is and has been for years an inmate of an insane asylum in England. She has a large estate as her separate estate; the husband also is wealthy. The husband has advanced money for her support, furnishing her with carriage, horses, nurses, and comforts and elegancies. He has a state-

ment of moneys advanced, amounting to more than \$2,000, and asks that the guardians be ordered to refund to him the amount out of her estate.

By the COURT: It is the duty of the husband to maintain the wife, whether she be sane or insane; and while he has the ability so to do, resort cannot be had to her estate.

The application is denied.

ESTATE OF HENRY B. COTTER.

No. 8498—July 9, 1878.

GRANT OF LETTERS.—NOMINEE OF NON-RESIDENT WIDOW entitled to letters in preference to the Public Administrator.

Under section 1365, C. C. P., the nominee of the widow, being himself competent, is entitled to letters in preference to the Public Administrator, notwithstanding that such widow is a non-resident and therefore herself incompetent to administer.

The law at the date of *hearing* the application governs, not that in force at the date of filing.

Construing sections, C. C. P., 1365, 1369; affirmed, Sup. Court, Feb. 27, 1880.

R. H. Lloyd, for Public Administrator.

E. J. & J. H. Moore, for nominee of widow.

Henry B. Cotter died intestate at St. Louis, Missouri, April 4, 1878, being a resident there and a non-resident of California, but leaving estate in California. He left a widow and two children, all residents of Missouri.

The widow declined to administer in person, but nominated in writing Thomas Crane as administrator, who filed his petition for letters.

The Public Administrator also petitioned.

On the hearing of the two petitions, the Public Administrator claimed that by reason of her non-residence, under a modification of the Code of Civil Procedure, made between the filing of the petition and the hearing, (C. C. P., Sec. 1365-69,) the widow was rendered incompetent to administer herself by reason of her non-residence; and that she was thereby incompetent to nominate.

The nominee of the widow claimed that the right to administer was vested at the date of the application, and could not be affected by any change in the law in that respect.

The Court held that the law at the time of hearing was the rule to be followed;

But it further held that Section 1365 designating the order of persons to take letters and making the first class, "The husband or wife or some competent person whom he or she may request to have appointed," gave such nominee of the widow precedence over all other classes; and that the competency or incompetency of the widow by reason of her non-residence was not material, provided her nominee was competent in that particular.

The petition of the Public Administrator was therefore denied and letters directed to issue to the nominee of the widow.

ESTATE OF OWEN GARRITY.

No. 4650—July 24, 1878.

EVIDENCE.—DEATH, PRESUMPTION OF, ON DISTRIBUTION.—In case of heirs who have not been heard from for a long time and who appear to have migrated from last *known* residence, the Court cannot base any presumption upon enquiries made only at such abandoned place of residence. Further search should be made to trace the missing parties before any action by the Court can be had in the premises looking to distribution.

Construing section, C. C. P., 1963.

M. Mullany, for claimants.

J. H. Smyth, for executors.

F. J. French, for absentees.

The deceased left a brother and sister surviving him, who now ask that the entire estate be distributed to them. They have each had one-third heretofore distributed, and now ask the residue. Deceased had another sister, who married one Leeds and died leaving two children. The Leeds children lived at Boston, Mass., until about 1871, when they and their father went west, supposed to Chicago.

Their subsequent movements are obscure, and it is not yet definitely known whether they are living or dead—but correspondence is now being had from which it is thought that one sister is living at St. Louis, Mo., and one with the father in Illinois; at all events, the Court cannot, from the evidence now before it, presume the Leeds children to be dead. It is known that they left Boston, and therefore inquiries as to whether they had been heard from as living there would be futile. The inquiry, from which the Court may be asked to presume them to be dead, must be made at their last place of residence, which, in this case, was not Boston.

The application for distribution is denied for the present, and the matter is postponed to Sept. 23d next, for the purpose of obtaining further proofs.*

ESTATE OF YEE YUN, OR YEE CHUCK WO.

No. 8507—Aug. 10, 1878.

LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED.—IN CASES OF TESTACY, THE GRANT OF LETTERS IS WITHIN THE DISCRETION OF THE COURT.—Where the Public Administrator and a Chinaman, ignorant of our language, laws, and mode of business, who has no intention to permanently reside, or be a citizen of California, are applicants for a grant of letters, in the case of a will which fails to appoint an executor, the Court's discretion will be exercised in favor of the Public Administrator.

Construing section, C. C. P., 1351, 1379.

R. H. Lloyd, for Public Administrator.

E. D. Sawyer, for Yee Bu Ki.

The deceased left a paper purporting to be a will, which all parties hereto admit to have been duly executed, and the same is entitled to be admitted to probate.

* Before the adjourned day, one of the Leeds children was discovered at Cheyenne, and brought here, and her identity proved and recognized, and she received one-half of the residue, the other half being retained to be claimed by her sister, if alive. The petition of the brother and sister of the testator for any further share of the estate was denied.

The controversy is as to who shall administer. No person is named in the will as executor. Testator had a wife in China, a brother living in Sacramento, and a nephew now here, who is sole legatee and devisee.

The brother requests that letters issue to Yee Bu Ki, (a Chinaman,) and the Public Administrator contests his application, and petitions for letters of administration to himself.

The attorney for Yee Bu Ki makes the point that as deceased left a will, although silent as to the executor, the Public Administrator has no right to administer; that his right is confined exclusively to cases of intestacy. It is a sufficient reply to that, to say, that the right of a brother to administer is provided for in the same section of the Code referring to the Public Administrator; and if the latter has no right to administer in case of a will, neither has the brother, and the selection of an administrator would be left with the Court.

The Public Administrator claims that the brother would have no right to administer, and that his nominee has no right, for the reasons:

1. The nominee is not a *bona fide* resident of this State;
2. The brother is not entitled to share in the personalty of the estate (the entire estate being bequeathed).

Without passing upon these questions, it is sufficient to say, that this case falls within Sec. 1379, of the Code of Civil Procedure, by which the Court is permitted to exercise its discretion; and as Yee Bu Ki is a foreigner by birth, who cannot become a citizen of the United States, who does not intend to reside permanently in this State; who does not speak our language; who has nothing in common with our interests except to be protected and acquire property; and as the Public Administrator is an officer selected by the people of this city and county, the Court exercises its discretion and denies the petition of said Yee Bu Ki, and grants the petition of the Public Administrator.

Let an order be entered accordingly.

ESTATE OF JOHN D. RICE.

No. 2596—Aug. 12, 1878.

JURISDICTION. — DECREE, RECITALS IN, TO SHOW THAT JURISDICTIONAL NOTICE HAS BEEN GIVEN.

In order to nullify the effect of recitals in a decree admitting a will to probate showing that notice has been given, where the formal affidavits in that behalf on file are defective, but not antagonistic to the recitals of the decree, it must be shown, not only, that the recitals in question are untrue in fact, but also, that the Court was imposed upon in the evidence heard.

Construing sections, C. C. P., 2010-11.

Jas. G. Carson and J. M. Poston, for petitioner.

Tobin & Tobin, contra.

This is an application to set aside the order heretofore made setting apart a homestead, on the ground that the Court had no jurisdiction of the proceedings, by reason of defective notice of the probate of the will of testator.

By the COURT: The order admitting the will to probate recites that service of the notice of the application for probate, was duly made upon all parties interested in the estate. The affidavits of service on file are defective as to the service; but they do not show that the recital in the order was untrue.

It was necessary for the petitioners to have shown, not only that the recital in the order was untrue, but that the Court was imposed upon in hearing the evidence upon which the law presumes that the recital was based.

The motion is denied.

ESTATE OF MARY J. MARDEN.

No. 7107—Aug. 12, 1878.

DECEASED MARRIED WOMAN.—CLAIM AGAINST HER ESTATE ON MORTGAGE TO SECURE HER HUSBAND'S DEBT. GROUND FOR ORDER OF SALE.

A mortgage given by a married woman to secure the debt of another is "a debt outstanding against the decedent," and a sale may be ordered in the Probate Court to pay it.

Construing sections, C. C. P., 1493, 1536.

Gunnison & Booth and *Tobin & Tobin*, for creditor.

F. W. Tompkins, for heirs.

Deceased was the owner of real estate, her separate property. Her husband gave his promissory note to the Hibernia Savings and Loan Society for a sum of money, and to secure its payment she joined her husband in a mortgage of a parcel of her separate real estate. A claim, based upon the note and mortgage, was presented to her executor, and allowed and approved. The executor, jointly with the Savings and Loan Society, asks this Court for an order of sale of the mortgaged premises, and that the proceeds, so far as required, be applied to the payment of the debt. This application is resisted on the ground, as contended, that the debt is not a "debt outstanding against the decedent," within the meaning of Sec. 1536, C. C. P.

By the COURT: The point involved in this controversy has not been directly passed upon in this State, so far as has been made to appear.

It is true that this may not be, in a technical sense, a debt of the decedent; but it is by her contract a debt for the payment of which a specific portion of her real estate is liable. Is it not, within the meaning of the Code, a debt outstanding against her? In the meaning of the Code, the words, "against the decedent," are the same as "against the property of the decedent." The Supreme Court, in *Harp v. Calahan*, 46 Cal., 231, say, in referring to the presentation of a similar claim, that "the policy which dictated the provision requiring claims against the estate to be presented

within a fixed period was intended to expedite the settlement of the estate, and to enable the administrator and the Probate Court to ascertain speedily and with certainty what debts were to be provided for, what sales of property would be necessary, and when the estate would be ready for distribution."

If, after such a claim has been presented, it cannot be paid by the executor, how is the settlement of the estate expedited? The executor would have simply to fold his hands and await foreclosure by the creditor; which might be deferred to within a day of four years, and at a rate of interest ruinous to the interest of the estate in the mortgaged property; whereas, by selling and forcing the creditor to take his money, something might be saved. If it is not a "debt outstanding against the decedent," the executor could not pay it, even if he had plenty of other resources.

Let a decree be made overruling the objections and that a sale be had.

ESTATE OF MARY MURPHY.

No. 8595—Aug. 19, 1878.

GRANT OF LETTERS OF ADMINISTRATION.—NON-RESIDENT EXECUTOR has no right to nominate administrator.

In case of a will, the Court has discretion as to appointee; and, there being no valid reason against it, prefers to appoint a public officer, who is more subject to the Court's control as to deposit of funds, than a private person.

Construing sections, C. C. P., 1365-9, 1379.

R. H. Lloyd, for Public Administrator.

J. F. Sullivan, for executor.

Testator was a resident of New York. His will was admitted to probate there, and an exemplified copy presented and admitted here. The executor, also a resident of New York, requested that letters of administration issue to a resident of this city named by him.

The Public Administrator contested the right of the executor's nominee, and petitioned for letters to himself, as his absolute right.

By the COURT: Neither of the petitioners has an absolute right to letters. Under Sec. 1379, the Court has the discretion of granting letters to such applicant as it may select. In this case the Court will, in the exercise of its discretion, grant letters to the Public Administrator. He is a public officer, and is more immediately under the orders of the Court, requiring the deposit of funds in the County Treasury.

ESTATE OF JOHN C. KEENAN.

No. 3414—Jan. 15, 1877.

ACCOUNT OF EXECUTOR.—GROUNDS FOR RE-OPENING ACCOUNT.

A minor, who has come of age, permitted to re-open the executor's account for the reasons:

1. Executor, in the capacity of attorney in fact for a claimant, making affidavit to claim, which was subsequently allowed by himself, as executor, and paid by him in the course of administration.
2. Executor presents his individual claim, which is allowed by a co-executor, but not by the Judge, until after the time for presentation of claims has expired.

August 22, 1878.

ADOPTION.—WILL.—A statement in a will, "A. B., my adopted son" is, *prima facie*, evidence of such relationship.

RIGHT TO ADMINISTER.—Such a statement is evidence that the party named is entitled to administer, or to request the appointment of another person as administrator.

Construing sections, C. C. P., 1365, 1637, 1962.

G. W. Gordon, for executor.

F. C. M. Du Brutz and *S. G. Harper*, for devisee.

The executor, Wetzlar, was the attorney in fact of Annie Tryon, who held a note against the deceased. The executor, as such attorney in fact, made affidavit to a claim on behalf of said Annie Tryon, and then as executor allowed the claim, Annie Tryon being absent from the State. He also presented the claim for approval. After such approval he as executor paid to himself as attorney in fact various sums upon the claim, which he remitted to Annie Tryon, and such sums were included in his account heretofore settled.

The executor held a claim against the deceased, which was allowed by a co-executor, but was not presented to the Judge for allowance until after the time for presentation of claims. Various sums were reported in the account as paid to Wetzlar.

Under a special act of the Legislature the executors borrowed a large sum of the Capital Savings Bank, of which the executor Wetzlar was President, and to secure the same executed a mortgage of the real estate of the estate. The money was to be repaid in instalments, interest being computed at one per cent. per month. Some of this money was used to pay upon the above mentioned claims of Tryon and Wetzlar.

The devisee asks that the settlement of the account of the executors may be re-opened, to the end that he may contest the same so far as it relates to the items above referred to. At the time of settling the account the devisee was a minor, and has recently come of age.

By the COURT: The order asked for must be granted.

August 22, 1878.

R. H. Lloyd, for William Doolan.

Geo. Cadwalader, for J. I. Felter.

The Public Administrator of this City and County petitions for letters of administration with the will annexed.

James I. Felter also petitions for letters, and has the request of R. C. Clark, assignee of a legacy, of Live Oak Lodge, No. 3, I. O. O. F., of Savannah, Georgia, and of George B. Keenan. The latter is mentioned in the will as the adopted son of the testator.

Robert F. Miller petitions for letters as guardian of Willie M. Keenan, a minor son of the wife of testator.

By the COURT: The Public Administrator is by law entitled to letters as against all of the above named persons except the nominee of George B. Keenan. There is no evidence of the adoption of said George by testator except the

clauses in the will where he speaks of him as "my adopted son, George B. Keenan;" and the point in controversy is, do the statements in the will that he was the adopted son of testator afford *prima facie* evidence of the adoption.

The Supreme Court have held that a statement in a will as to parentage by birth may be received as *prima facie* evidence, and no reason is apparent why the same rule should not apply to this case.

The petitions of the Public Administrator and of Robert F. Miller are denied, and the petition of James I. Felter is granted.

ESTATE OF CHARLES BROAD.

No. 7446—Sept., 1878.

ACCOUNT OF EXECUTRIX.—ITEMS OF TAXES AND ASSESSMENTS DISBURSED ON ACCOUNT OF REAL ESTATE SPECIFICALLY BUT CONDITIONALLY DEVISED CHARGEABLE UPON ESTATE.—RENTS TO BE COLLECTED BY EXECUTRIX UNTIL CONDITION HAS BEEN FULFILLED.

Where a parcel of land has been devised conditioned that the devisee pay to a legatee the sum of one thousand dollars, the title does not pass until the money is paid; and the executrix must, out of the estate, pay the taxes, etc., upon the lot, and is entitled to the rents, until condition complied with.

Construing section, C. C. P., 1669.

John Wade, for widow and executrix.

J. C. Cary, for contestant.

The controversy arises under the following clause in the will:

"I give and bequeath to my daughter, Lilly Ann Broad, all that certain [real estate] subject to my said daughter paying to my wife \$1,000; the title to said piece of land shall pass to my said daughter upon payment of said sum, and not until she pays said sum to my said wife."

The executrix has collected the rents and has paid taxes and street assessments on this lot. The receipts exceed the disbursements.

By the COURT: By this will the title does not pass to Lilly until the payment of the \$1,000. The right to the

rents and the duty of bearing the burden of taxation follow the title; and until the title passes, the right to the rents is in the estate. Lilly can have the rents only from the time of paying the \$1,000.

Objections to the account overruled.

ESTATE OF WILLIAM C. HINCKLEY.

No. 7036—July 28, 1878.

WILL.—DISTRIBUTION.—BEQUEST IN TRUST FAILING BY REASON OF DEATH OF BENEFICIARY.

A bequest to trustees of a sum of money, the principal and income to be applied in their discretion for the benefit of a beneficiary who dies subsequently to the testator, but before any distribution, falls to the heirs at law or residuary legatee.

The words constituting a person residuary legatee "of all my estate not hereinbefore devised and bequeathed," are to be construed as passing to such person a legacy which has lapsed in the manner and for the reason above stated.

Expenses to which the trustees of such bequest have in good faith been subject should be paid out of the trust fund and the residue to the residuary testamentary heir.

October 3, 1878.

JURISDICTION OF PROBATE COURT.—DEVISE.—DISTRIBUTION.—CREATION OF TRUST.—

The Probate Court has jurisdiction, in cases of devises or bequests which may or may not be illegal, either as creating improper trusts or otherwise, to pass upon the question of their validity; and, finding them invalid, in whole or in part, to distribute the property affected by the illegality either to the heir at law or person otherwise entitled.

DISTRIBUTION SUBJECT TO MORTGAGE.—A parcel of real estate covered by a mortgage may, should the devisees so request, be distributed to them subject to the mortgage, provided the mortgage creditor waives all recourse to any other portion of the estate for the satisfaction of his claim; and such mortgage debt shall, upon such distribution, in so far as the estate and executors are concerned, be treated as a cancelled liability.

PERPETUITY.—A devise coupled with power to alienate cannot be considered void as creating a perpetuity.

UNCERTAINTY IN DEVISE IN TRUST FOR CHARITABLE PURPOSES.—Such devise is expressly authorized under Sec. 1313, C. C., and it appearing that the *mode* of execution is left to the "wisdom, faithfulness, and discretion" of the trustees, and that the object of the trust is the advancement of the cause of beneficence and charity, the devise cannot be considered uncertain as to the beneficiaries, since by the discretion of the trustees, aided, it may be, by a court of equity, that which is indefinite may be rendered certain.

THE LIMITATION OF ONE-THIRD OF HIS ESTATE IMPOSED UPON A TESTATOR AS TO HIS CHARITABLE BEQUESTS by Sec. 1313, C. C., means one-third of the gross value not the net value after payment of debts.

TRUSTEE AS PURCHASER OF CLAIM UPON THE FUND.—There is nothing antagonistic to the trust in the purchase by a trustee of a mortgage upon the trust property. Construing sections, Const., (old) Art. XI, 16; (new) Art. XX, 9; C. C., 1313; C. C. P., 1665, 1678.

C. E. Royce, for E. B. Badger and others.

E. D. Sawyer, for heirs at law.

Lloyd Baldwin, for residuary legatee.

S. H. Phillips, for executors.

Testator directed the executors to pay to E. B. Badger and two others \$3,000 in trust, that they apply the principal and income for the benefit of James Campbell according to their discretion.

Testator died April 11, 1876, and James Campbell died August 21, 1876. Testator left him surviving heirs at law, who are still living.

E. B. Badger and others applied for the distribution to them of the \$3,000 mentioned in the will, claiming that upon the death of testator the right to the legacy became vested, and the subsequent death of Campbell did not defeat the bequest.

By the COURT: The object and purpose of the trust has ceased and determined, and the effect of the bequest falls with the purpose. The purpose was that the \$3,000 and its income should be for the sole use and benefit of James Campbell during his lifetime, and no equitable estate of inheritance was intended to be created. The petition is denied; but it being intimated that the trustees incurred liabilities in consequence of the trust before the death of Campbell, they may make proof thereof and present the same for future consideration.

Subsequent proceedings were had by which the sum of \$500 was directed to be paid to reimburse the trustees for liabilities incurred before Campbell's death; leaving \$2,500 of the legacy undisposed of.

The heirs at law filed a petition that the \$2,500 be adjudged to belong to them.

E. D. SAWYER: The \$2,500 belong to the heirs: Miss Hinckley is residuary legatee "of all my estate not hereinbefore devised and bequeathed." The item of \$3,000 *was* thereinbefore bequeathed, viz: to the persons in trust for Campbell, which removed that sum from the residuary clause, even if by a subsequent event the bequest should fail in being carried into effect. As the legacy failed subsequently to death of testator, this money was not in effect bequeathed, and goes to the heir.

2 Redf., 117; 5 N. Y., 409; 7 Hill, 352.

LLOYD BALDWIN: This money goes to the residuary legatee. 68 Penn. St., 84; 40 Conn., 250; 17 Md., 23; 4 Vesey, 708; 4 Kent, 541. Testator took the \$3,000 out of the estate for James Campbell *only* and only for his life; and when that object fails, it goes under the residuary clause. Courts are against partial intestacy. 4 Paige, 117; 2 Coll. Ch., 516; 8 Vesey, 24; 30 Ind., 292; 45 N. Y., 254; 3 Yates (Penn.) 187; 6 Paige, 607; 1 Dana, 206; 4 Vesey, 708; 5 Vesey, 501; 2 Madd. Ch., 94.

By the COURT: The heirs are not entitled to the money; it goes under the residuary clause to Miss Hinckley. Whatever was not given for Campbell was given to her. He having a life interest only, all except that life interest went under the will. Upon the death of Campbell the money could not be paid to the trustees, the object of the trust having failed.

October 3, 1878.

Stephen H. Phillips, for executors.

Doyle & Barber, for the residuary legatee.

Testator died April 11, 1876, leaving an estate valued in the inventory, filed June 5, 1876, at \$135,269.50; of which, the California Theatre property was valued at \$120,000.

The debts have all been paid, except a debt presented by the Hibernia Savings and Loan Society for \$37,500 and interest, which has been allowed and approved. This claim

has been assigned to and is now held by F. H. Woods, one of the trustees hereinafter named, and by an instrument filed herein by him dated June 8, 1877, he states that the amount then due was \$37,500, and he relinquishes all claim against any property of said estate except the California Theatre property, which was mortgaged to secure the debt.

All the legacies have been paid except those hereinafter mentioned.

The trustees hereinafter named now ask distribution of the California Theatre property to them upon the trusts named in the will, which is resisted by Mary H. Hinckley, the residuary legatee and devisee.

The following are the clauses in the will relating to the subject in controversy:

"I give the property known as the California Theatre property, being the property now subject to a lease to H. P. Wakelee, [recorded, Liber 28 Leases, page 172, to which reference is had], for a term of years, and which lease is a part of the conditions under which this bequest is made, together with all rights which move to me or my heirs and assigns under or by virtue of such said lease, to the following named persons, my fellow citizens and members of the First Unitarian Society of San Francisco aforesaid, viz: Horatio Stebbins, C. Adolphe Low, Horace Davis, George C. Hickox, Stephen H. Phillips, Frank H. Woods, Louis H. Bonestell, Charles A. Murdock, John C. Merrill, and John H. Madison [the last named to have no successor], in trust, nevertheless, for the following purposes:

"To pay to my relatives hereinafter named, that is to say, [naming twelve persons], three thousand dollars each, from the income of the said property under the lease aforesaid, or from the capital amount paid by the lessees under said lease for the property, if said lessees choose so to pay it according to the terms of said lease. * * After the payment of these bequests as herein provided, the remaining part of the California Theatre property, either under the lease or in capital amount paid by the lessees, as the case may be, shall be devoted to the establishment of a perpetual fund, to be called the William and Alice Hinckley Fund, the

income of this fund to be devoted perpetually to Human Beneficence and Charity; and while I do not wish to set arbitrary limits to the wisdom, faithfulness, and discretion of my trustees, desiring as I do to foster Religion, Learning, and Charity, I wish to call their attention to the trials and afflictions of the industrious, striving, unfortunate poor, and especially to the aged, the infirm, and the lonely. I wish also, to show my interest in good learning, and my sympathy with honorable and striving young men, to set apart from the income of this fund the sum of three hundred dollars per annum, to be known and designated as the Hinckley Scholarship, to be given to some worthy, talented, industrious, and needy young man, who is pursuing liberal studies, either in the University of the State or in any other school, as the trustees shall name."

The will provides a mode of selecting successors to the members of the board of trustees; and requires the trustees to report annually its condition and their doings under the will to the trustees of the First Unitarian Society of San Francisco.

"Finally, I dedicate this fund established by this will, in my own name and in the name of my beloved wife, to the interests of religion, learning, and charity; and I desire by it to express my sympathy with my fellow-men and my humble faith in God, the father and friend of all."

The residuary legatee, in resisting the petition for distribution, makes the following points, among others:

1—The debt to Woods is still outstanding; distribution of an estate cannot be had until all the debts are paid; the Court has no power to distribute, subject to a mortgage lien.

2—The charitable devise is utterly null and void, not being within section 847 of the Civil Code.

3—The will attempts to create a perpetuity, which is not authorized by the law of this State.

4—The charitable trust is void, for uncertainty, both as to the form or mode of the charity, and as to the beneficiaries for whom it is designed.

5—The direction to set apart \$300 per annum for the Hinckley scholarship is null and void, because it is not a trust permitted by our statute; it creates a perpetuity; no right of selection of a person to be benefited is given.

6—The devise for charitable uses is void, as to the excess over one-third of the estate. From the aggregate value at death, deduct the debts; one-third of the residue is the legal limit of a charitable devise.

The trustees, besides replying to the points made by the residuary legatee, interpose the suggestion, that it is unprofitable for this Court to inquire into the mode of administering the trust, which must ultimately fall under the supervision of a Court of Chancery; it is enough for a Probate Court to know that there is something for trustees to do, although some of the trusts may be invalid, and although after some duties may have been performed, a trust may result in favor of a residuary legatee.

In reference to this suggestion, it may truly be said that it would be unprofitable for this Court to inquire into the mode of administering the trust, which may (not necessarily must) fall under the supervision of a Court of Chancery; but it is profitable, it is not only the province, but it is, under our system, the necessary province of a Probate Court, to inquire and determine whether a valid trust has been created. The mode of administering, the power to regulate and direct its subsequent administration, is quite separate and distinct from a question of whether a legal trust is expressed. So, in regard to whether all the objects of the trust are legal or not. Sec. 1665, C. C. P., provides that "the Court must proceed to distribute the residue of the estate * * among the persons who by law are entitled thereto." A trustee of a devise takes no estate unless there is a legal, valid trust created. The trust attempted to be created may be legal in part and illegal in part. This Court in making distribution must determine how far the trust is legal and how far illegal. The decree of distribution, founded upon the will, is the warrant or charter of the trustees, and by it the general objects of the trust are expressed.

To illustrate by an extreme case (and by extreme cases principles are frequently better illustrated), suppose a will gave \$10,000 to A. B., in trust that he expend one-half of it in supporting and educating C. D., a minor (an object clearly legal), and one-half of it to establish a gambling or other house of vice (the illegality of which no one doubts), can it be said that the Probate Court, because there is one good object, must distribute to the trustees the whole \$10,000, and leave the heir at law to a Court of Equity to have a resulting trust in his favor declared? Clearly not. The distribution must be to those "who by law are entitled thereto;" the trustee is entitled to that portion of the property only which is to be devoted to objects recognized by the law, and to the extent only that they are recognized. Therefore, in the case at bar, this Court must determine what objects expressed in the will are valid in law, and to what extent, and distribute accordingly.

The objection of the residuary legatee that the estate cannot be distributed until the Woods debt shall be paid, is not good. The creditor is willing that the estate should be distributed, subject to his mortgage; the trustees, who take the legal title, are willing; it does not rest with the residuary legatee to make the objection, especially as in 1877 she applied for and obtained, as a partial distribution, the residence devised to her, and in her petition stated the facts, that Woods held the debt and had released the balance of the property of the estate. Woods, in taking the assignment of the debt and mortgage, is not within the prohibition of Subdivision 1, Sec. 2,230, Civil Code. The transaction was not "adverse to the beneficiary." The debt already existed, and its purchase by him may have been for the very purpose of preventing a foreclosure and sacrifice of the interest of the estate. She appears to have been fully advised of the whole transaction.

The next objection is, that the charitable devise is null and void, not being within Sec. 847 of the Civil Code.

Upon the argument, it was contended by the Trustees that the Statute 43 Elizabeth, well known as the Statute of Charitable Uses, is in full force in California, and is the

principal source of the Law of Charities; and that the objects named in that statute as charitable are known to our law as charities; and that in case of a devise or bequest for charitable uses, if the purpose named in the will cannot be carried out, a Court of Chancery will apply the doctrine of *cy pres*, and select such objects as, in its opinion, shall be as near as may be to the object expressed by the testator.

In *Ould v. Washington Hospital*, 5 Otto, 309, the Supreme Court of the United States say that the opinion prevailed extensively in the country for a considerable period that the validity of charitable endowments and the jurisdiction of courts of equity in such cases depended upon that statute; but that idea has since been exploded, and has nearly disappeared from the jurisprudence of the country; that the statute was purely remedial and ancillary; it provided for a commission to examine into abuses already existing; the statute was silent as to the creation or inhibition of any new charity, and it neither increased nor diminished the pre-existing jurisdiction in equity touching the subject.

Bouvier in a note says that the main object of the statute was to distinguish between those objects which had been before the Reformation deemed superstitious.

The statute has not been re-enacted or generally followed in the United States. In Virginia and New York, it has been repudiated. In Georgia, Massachusetts, and some other States, it has been acted on. And this will account for the fact that the decisions cited on the argument from the New York and Massachusetts reports are so directly opposite.

The statute has never been enacted or adopted in California; at most, it merely defined what should be deemed in England at that time to be charities. Several of the objects named therein as charities would not be sustained now in this State as such; for instance: for repair of churches; for marriage of poor maids; for redemption of prisoners or captives; for ease and aid of poor inhabitants concerning payment of fifteenths. What objects shall be deemed to be charitable, change with the condition of society. As for instance, the noted Jackson will case in Massachusetts (14

Allen, 576), by which will money was bequeathed to aid in the abolition of slavery; but as slavery was subsequently abolished, the object of the intended charity no longer existed. So, in regard to religion. By the law of this State, all persons are protected in the enjoyment of their own particular religious views; but no particular system of religion is especially sustained. Suppose a devise to be made in aid of religion. If the question were asked, What is religion? who shall authoritatively answer? Who can tell what the testator meant? The Catholic has his view, the Greek another, the Protestant many, and they all join in condemning that of the Koran. Religious corporations can be formed and may exercise functions as such; but no such corporation can take under a will.

Civil Code, Sec. 1275.

In this State religious corporations are not deemed charitable.

We must look to our own law and to the present condition of things here to determine what objects are charitable. Without attempting to define all that may be held to be charitable objects, such objects will certainly embrace the indigent, sick, deaf, dumb, blind, orphans, unfortunate poor, the aged, the infirm, the lonely, the young persons striving for education, colleges and schools, and their instructors and pupils.

Sec. 857, Civil Code, authorizes the creation of a trust to sell real property and apply or dispose of the proceeds in accordance with the instrument creating the trust; and Sec. 1313 provides that no estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses except the same be done by will executed at least thirty days before the death of the testator; and if so made, such devise or legacy shall be valid; which clearly and in terms authorizes a devise or legacy, to a person or persons in trust for such uses as are by the law of this State recognized as charitable uses and for benevolence.

The will of Mr. Hinckley endeavors to create a fund, the income of which shall be devoted to Human Benevolence and Charity; the words charitable and benevolent being the very words used in Sec. 1313. The word "benevolent" has often been construed by Courts to mean the same thing as "charitable," in the law, and trusts for charitable or benevolent purposes have been carried into effect.

Perry on Trusts, Sec. 712.

The next objection is, that the devise for charitable uses is void, because the will attempts to create a perpetuity.

A perpetuity is a limitation of property, such as renders it unalienable beyond lives in being. In this will there is no limitation whatever; no restriction upon alienation. The property is under lease, with a right in the lessees to purchase it, and if the lessees should omit to purchase it, the trustees could sell it, and invest the proceeds in other property.

The residuary legatee also urges that the charitable trust is void for uncertainty, as to mode of execution, and as to the beneficiaries.

The will leaves the mode to the "wisdom, faithfulness, and discretion of the trustees." If the trustees should at any time fail to act with "wisdom, faithfulness, and discretion," there is power to supervise and compel such action, resting either in a Court of Chancery, or in such tribunal as the Legislature may give authority to act in that regard. So, as to the beneficiaries. The selection of the particular persons who are to receive benefit is left to the trustees, so long as the selecting and dispensing be within benevolence and charity. The very term, charity, implies a degree of uncertainty as to the particular persons to be benefited; for, when a testator makes the selection, the bequest ceases to be charitable, in the legal sense, and is direct. "In order that there may be a good trust for a charitable use, the persons to be benefited must be uncertain and indefinite until they are selected to be the particular beneficiaries of the trust for the time being." Perry on Trusts, Sec. 710. The testator calls "attention to the trials and afflictions of the industri-

ous, striving, unfortunate poor, and especially to the aged, the infirm, and the lonely." Is there not enough in those words to indicate to the trustees the direction which the testator desired his bounty to take, and to enable a court to compel the trustees to act accordingly, if such compulsion should be necessary? Most certainly; and that, too, without having to resort to the doctrine of *cy pres*, so thoroughly and learnedly discussed in the argument. It is not necessary in this place to consider the rise of that doctrine, further than to say, that it in great measure had its inception in an assumed prerogative of the King of England, and has been many times used, down to and including *Jackson v. Phillips*, 14 Allen, 539, to make wills for people, and to give direction to the property which could not, by any reasonable construction, have been in the mind of the testator. It may be very much doubted whether the doctrine of *cy pres*, [near to which, as near as may be,] is of any force, in this State, regarding charitable devises, further than to provide machinery for executing the trust, where the machinery named in the will becomes unmanageable or breaks down. It may be resorted to to furnish means for distributing bounty, not to supply the object.

Perry on Trusts, Sec. 728.

It is immaterial how uncertain, indefinite, and vague the beneficiaries of a charitable trust are, provided there is a legal mode of rendering them certain. Thus, a gift to trustees to educate six orphan boys, to be selected and put to school by them, is uncertain, as the boys are uncertain until they are selected. To say that such a trust should fail, and that the heir should take the fund, because there is no orphan boy who can come into court and claim the bequest, would be to subvert the foundation of public charity. In all such cases the heir, or other person interested, may bring his bill to test the legality of the charity, the trustees may bring their bill for instruction, or the attorney-general may bring a bill or information to establish the trust; and if there be any abuse of the trust or mismanagement of the funds, and there be no individual having the right to maintain a

bill, the attorney general, representing the sovereign power and the general public, may bring the subject before a court and obtain perfect redress.

Perry on Trusts, Sec. 732.

The objection as to the \$300 per annum, for the Hinckley scholarship is equally untenable. It is a trust to aid some worthy, talented, industrious, and needy young man—which is clearly charitable. The class of persons to be benefited is clearly indicated, and the selection of the person is left with the trustees.

The residuary legatee also objects that even if the devise for charitable uses is good at all, it is void as to the excess over one-third of the estate, that from the aggregate value at the death, the debts must be deducted, and that one-third of the residue is the legal limit of a charitable devise.

Sec. 1313, above referred to, contains the proviso; “that no such devises or bequests [in trust for charitable uses], shall collectively exceed one-third of the estate of the testator leaving legal heirs; * * and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin or heirs, according to law.” Under this section, the devise in trust for charitable uses is void as to the excess over one-third of the estate. The value of the estate of Capt. Hinckley, at the time of the appraisal, made within two months after the death, was \$135,269.50. *His estate* consisted of that amount of property; not that amount less the debts. Through the entire code, commencing with the first step for administration, *the estate* of the deceased person includes all the property he died seized of; a portion of which may, or may not be taken to pay debts and expenses, as occasion may require. No testimony was offered to show that the valuation was erroneous; therefore, the Court is justified in taking that as the valuation for the purposes of this opinion. One-third of the \$135,269.50 is \$45,089.83, which is the extent to which the charitable devise is valid. As there is a devise to the trustees for other purposes than charitable, viz: To pay

\$3,000 to each of twelve persons named, the legal title passed to the trustees; they therefore take the title, but they take it in trust, to pay the \$36,000 to the persons named, to establish a fund of \$45,089.83 for the charitable purposes indicated in the will, and as to the residue there will be a trust in favor of the residuary legatee.

In so far as the devise in the will is in trust for religious purposes, it is void.

Let a decree be drawn, distributing the said California Theatre property (describing it by metes and bounds), together with the lease above mentioned, and all rights reserved in said lease to the lessors, to the said trustees above named (expressing the mode of selecting their successors), subject to the mortgage held by F. H. Woods, in trust for the following purposes, viz:

1—From the income of the said property under the lease aforesaid, or from the capital amount paid by the lessees under said lease for the property, if said lessees choose to pay it according to the terms of said lease, to pay to each of said twelve persons above named, relatives of said deceased, three thousand dollars; such amounts to be paid as soon as may be;

2—Of the remaining part of said property, either under the lease or in capital amount paid by the lessees, as the case may be, the sum of \$45,089.83 shall be held by said trustees and their successors in trust to be known as the William and Alice Hinckley Fund, out of the income thereof to set apart \$300 per annum, to be known and designated as the Hinckley Scholarship, to be given to some worthy, talented, industrious, and needy young man, who may be pursuing liberal studies, either in the University of this State or in any other school, as the trustees may name, the residue of the income of said sum of \$45,089.83, to be devoted to Human Beneficence and Charity; and while arbitrary limits are not set to the wisdom, faithfulness, and discretion of the trustees, their attention is called to the trials and afflictions of the industrious, striving, unfortunate poor, and especially to the aged, the infirm, and the lonely.

3—All the rest and residue of said property, its proceeds, and income, to be paid and delivered to said Mary H. Hinckley, residuary legatee, as soon as the same can be ascertained, paid, and delivered.

ESTATE OF JOHN WELCH.

No. 8686—Oct. 15, 1878.

EVIDENCE.—WITNESS.—A creditor can testify as to the fact of the indebtedness of decedent to him on hearing of application for letters.

Construing sections, C. C. P., 1865, 1878, 1880.

M. Cooney, for Cannon.

A. P. Needles and *G. D. Buckley*, for Loughman.

The two applications were heard together. Loughman offered himself as a witness to prove that deceased was indebted to him. Mr. Cooney objected, that a creditor is not competent.

By the COURT: The witness is not within Sec. 1880, C. C. P. This is not a proceeding against an executor or administrator, but is a controversy between two persons claiming administration. When Loughman presents his claim for allowance, a different point will be presented.

Objection overruled.

ESTATE OF WILLIAM R. DERRY.

No. 8710—Oct. 24, 1878.

WILL.—EXECUTION OF.—Witness' signature by his mark ATTESTED BY CO-WITNESS.

One of the witnesses to a will may write the signature of his associate witness to the will when such associate witness is unable to write, and may then write his own name as a witness that such illiterate witness has attested the execution of the will by his mark.

Construing section, C. C., 1276.

C. Halsey, for proponent.

J. M. Allen, for contestant.

One of the witnesses to the will did not write his name, being uneducated. The other witness, besides signing as a witness to the will, wrote the name of his associate witness, and wrote his own name as a witness to the mark of the associate.

HELD, this is a good witnessing of the will.

ESTATE OF EMIL LOEVEN.

No. 8036—Oct. 29, 1878.

NOTICE TO CREDITORS BASED ON VALUE OF ESTATE.—Where it appears by the inventory and appraisement, that the value of the estate exceeds \$10,000, the executor must give a notice for ten months in which to present claims.

In such case, a notice for four months already given is a nullity.

The executor cannot support his action in giving a notice for four months by showing that property in the inventory and appraisement, is not property of the estate; but he is bound by the appraisal figures.

Construing sections, C. C. P., 1443, 1490-1.

J. T. Humphreys, for petitioner.

C. P. Goff, for executor.

The executor returned an inventory with appraisal of \$10,000, and published notice to creditors to present their claims within four months. Subsequently the widow moved that other property be appraised. The executor admitted other property; the Court ordered its appraisal, and it was returned valued at \$26.50. The widow then moved the Court for an order that the executor give notice to creditors to present their claims within ten months. The executor replies that he has already given a notice for four months; that the value of the estate is less than \$10,000; that a piece of real estate valued in the first inventory at \$2,500 does not belong to the estate.

By the COURT: The executor cannot impeach his inventory and appraisal. It appears of record that the estate is of the value of \$10,026 50, and therefore the notice to

creditors must be for ten months instead of four. The notice already given goes for nothing. The Court has power to compel its officer to comply with the statute.

Order made.

ESTATE OF ELIZA HASKELL.

No. 8382—October, 1878.

RES ADJUDICATA.—GRANT OF LETTERS OF ADMINISTRATION.—WHAT IS ADJUDICATED BY THE ORDER.—HEIRS NOT THEREBY PRECLUDED FROM SUBSEQUENT DENIAL THAT THE ADMINISTRATOR IS NOT THE HUSBAND OF DECEDENT.

In granting letters, the only questions decided by the Court are, whether there is property; whether the Court has jurisdiction; and whether the party applying is competent.

When letters have been granted to a person, whether claiming the grant as heir or creditor, the question of heirship or of the validity of the claim as creditor, must be passed upon in an independent proceeding; there being no contest to act as an estoppel.

Construing section, C. C. P., 1365.

C. H. Parker, for Haskell, administrator.

G. F. Sharp and *J. C. McCeney*, for Volena E. Harrigan.

J. M. Burnett, for R. D. Scofield.

Heretofore, Haskell, as husband of deceased, applied for letters of administration, which were granted. After four months, R. D. Scofield petitioned for partial distribution, claiming the whole estate as sole heir at law, alleging himself to be the only child of deceased by a former marriage, and that the marriage with Haskell was void. Haskell answered the petition, alleging the grant of letters to him, and claims that all parties are now estopped from questioning his relationship; that the order of this Court granting letters to him is an adjudication for all purposes that he was the husband of deceased. Volena E. Harrigan demurred to the answer, and argument was had on the demurrer.

By the COURT: The object of the petition for and the grant of letters was to have an adjudication that the deceased had died, and that she left estate subject to administration

in this Court. The existence and allegation of these facts, the requisite notice being given, gave the Court jurisdiction. The question as to who should be the administrator is quite another matter. The administrator is but an officer of the Court. The object of alleging that petitioner was the husband, was for the purpose of showing that he had a right to administer, over all others. The Court could have granted letters to him even if the petition had not alleged the relationship. The question of relationship and the consequent right to succeed to a portion or the whole of the estate was not then in issue, and would not arise for purposes of succession until distribution be asked for. By the notice which was given on application for letters, the attention was not challenged as to who should succeed or had succeeded to the estate; it was challenged only to the matter of having administration. Suppose a creditor should apply for and obtain letters, would the grant be conclusive as to his debt, and he be under no necessity of having it allowed before payment? By no means.

The demurrer is sustained.

ESTATE OF MARGARET M. MYERS.

No. 8762—Oct. to Dec., 1878.

PLEADINGS.—An opposition to the probate of a will on the ground of menace, undue influence, etc., should state the facts constituting such improper conduct.

WILL.—A mere reference to extraneous papers in an instrument offered for probate does not necessarily make such papers a part of the will for the purposes of a probate record.

Construing section, C. C. P., 1312.

Taylor & Haight, for proponents.

Chas. Halsey, contra.

The will of deceased was filed for probate Oct. 24, 1878, and contained the following clause:

“As the legacies which my husband, John Myers, and myself desire to leave are provided for by his will, I give, devise, and bequeath,” etc.

Oct. 28, 1878, R. J. Farren, as an heir, filed objections to the will on the grounds:

- 1—That the proposed paper is not the will of deceased;
- 2—That said paper is not properly attested by two or more witnesses;
- 3—That at the execution of said paper said decedent was acting under restraint, undue influence, menace;
- 4—That it is stated in said paper that another instrument was already executed, and such other instrument was thereby made and became a part of said pretended will, and should also be produced and filed in Court before said proposed will can or should be probated.

To which, the proponents demurred on the grounds:

- 1—The opposition does not state facts sufficient to constitute grounds why said document should not be admitted to probate;
- 2—The third ground of opposition is ambiguous, unintelligible, and uncertain, in this, that it does not appear what person, if any, restrained, unduly influenced, or menaced deceased in the execution of the will.

The demurrer was overruled as to the first point and sustained as to the second point.

Nov. 11, 1878, said R. J. Farren filed an amended opposition, on the grounds:

- 1st, 2d and 3d, the same as in the former opposition;
- 4—That in said proposed will it is stated that certain legacies which the decedent desired made had been and were provided for in an instrument then already executed, to wit, the will of John Myers, husband of deceased; that said will of John Myers was executed at or before the execution of the proposed will, and that the legacies mentioned in the proposed will, which were provided for in the will of John Myers, became and now constitute parts of the will of deceased;
- 5—That a bequest to him (Farren) was, with the knowledge and by the desire of decedent, made and provided for in said will of John Myers, and said will of John Myers ought to be produced and filed in this Court before said proposed will can or should be probated.

The proponent demurred to the amended opposition on the same grounds as to the original opposition.

The demurrer was overruled as to the first point and sustained as to the other points.

Dec. 14, 1878, said Farren filed amended opposition, on the grounds:

1—Said instrument is not the last will of deceased;

2—Said deceased was acting under undue influence exercised over her by her husband, John Myers, by J. J. Sullivan [proponent] and his wife;

3—That certain legacies which decedent desired and intended to make and provide for, or to be made and provided for, had been and were made and provided for in a will executed by her husband John Myers, by his and her joint consent and agreement;

4—That a bequest to said Farren was, by the desire of deceased, and in pursuance of the agreement aforesaid, made and provided for in the will of said John Myers; that the will of said John Myers ought to be produced and filed, and the whole or so much thereof as related to or provided for the legacies desired by the deceased made or to be made ought to be established and declared to be part of decedent's will.

Proponent demurred to the opposition, on the grounds:

1—That the opposition does not state any fact or reason why the proposed will should not be probated;

2—That the second ground of opposition is ambiguous, unintelligible, and uncertain, in that it does not appear in what manner or through what means deceased was unduly influenced;

3—That the third ground of opposition does not state any fact or reason why said proposed will should not be probated;

4—That the fourth ground of opposition does not state any fact or reason why the proposed will should not be admitted to probate.

The demurrer was overruled as to the first point, and sustained as to the others.

The reasons for overruling the demurrers were as follows:

1—It is not sufficient to state that a proposed will was the result of menace, undue influence, and restraint. The opposition must state the *facts* which constitute the menace, influence, or restraint, in order that the Court may determine whether those facts constitute in law the result aimed at. And the fact as to each ground of opposition must be separately and distinctly stated. The facts which constitute undue influence would not necessarily embrace menace or restraint; and, *vice versa*. Unsoundness of mind, is a fact; but the other grounds of opposition named in the statute are the *result* of facts.

2—The alleged will of John Myers forms no part of the will of deceased. The deceased in her will expressly leaves the parties to the bounty of her husband. Whether or not John Myers could subsequently change his will, is not a question to be now determined.

The contestant subsequently moved the Court that the proponent be required to produce and file the alleged will of said John Myers.

The motion was denied. It not being a part of the will of deceased, the Court cannot cause it to be filed. If it be material to use it as evidence for contestant on the trial, he has the process of the Court to compel its production.

ESTATE OF F. X. MURRAY.

No. 8761—Nov. 4, 1878.

ADMINISTRATION, WHERE THE ALLEGATION OF THE EXISTENCE OF ESTATE IS ONLY COLORABLE, DENIED.

There can be no grant of administration where the apparent motive of the application is to clothe some one with the legal status of administrator, merely to make him defendant in a suit to quiet title, there being no estate, other than personal clothing which may not be actually in existence at the date of the application.

Construing section, C. C. P., 1371.

J. Rothschild and *A. C. Searle*, for petitioner.

Deceased died February 13, 1875, leaving a widow. Henry Dutton now applies for letters of administration. Deceased left no property except personal clothing, valued

at less than \$100, which was taken possession of by the widow; her whereabouts is unknown, and whether or not the clothing is in existence is unknown. The real object for which letters are sought is apparent from the following facts: The widow, in her husband's lifetime, had a parcel of land conveyed to her, the deed expressing a money consideration; the money paid was her separate estate. The husband and wife joined in a mortgage of the land to the Farmers' and Mechanics' Bank, to secure her individual debt. After the death of her husband she executed a deed of the property to the bank. Mr. Dutton is president of the bank, and he now applies for letters of the husband's estate, to the end that the bank may commence suit against him as administrator, to obtain a decree that the husband had not and that his estate has no interest in the property.

By the COURT: The application is denied. The object of administration is to pay debts and distribute the surplus to the heirs. In order to have administration there must be property to be administered upon. The very foundation of Mr. Dutton's action is that the deceased had no property, except, it may be, the clothing, which the widow took. The existence of the clothing was brought forward for the sole purpose of attempting to save the jurisdiction of the Court; of course the bank does not wish to have its officer administer for the purpose merely of having that clothing set over to the widow, who had it.

ESTATE OF PATRICK TANEY.

No. 8545—Nov. 5, 1878.

WILL.—SIGNATURE.—NAME OF PROPOSED TESTATOR WRITTEN BY ANOTHER PERSON
NOT A WITNESS TO THE WILL AND NOT IN THE PRESENCE OF THE WITNESSES.

HELD, that the testator should have called the attention of the witnesses to the fact that he had signed the document; and that it had been *subscribed by him or by his authority*.

Construing section, C. C., 1276.

J. C. Bates, for proponent.

M. Mullany and *A. M. Crane*, for contestant.

The deceased was an unlettered man; could neither read nor write. At his request his friend Elligot, using a printed blank, filled out a paper intended for a will. It was prepared under Taney's immediate supervision, and according to his instructions. After keeping it about three weeks, Taney desired to have it executed, and requested Elligot to write his (Taney's) name, which he did at the foot of the paper, and Taney made a ✕ at the end of his name. Some two or three days after that, Taney and Elligot, knowing that it was necessary to have two witnesses, went to a neighboring house and found two acquaintances. Taney, producing the paper from his pocket, said to the persons, "I want you to witness my will;" or, as one of the witnesses remembered, "I wish that you would witness this will." Taney placed the paper on the table, and both the witnesses signed the printed attesting clause. Taney did not say anything about his signature, nor his mark, nor about his having had his name signed. One of the witnesses did not see any signature of Taney's name, and the other does not know whether he saw it or not. Their attention was not called to the signature. Elligot's name does not appear on the paper.

Two points are made by the contestants, viz:

1—Elligot, having written the name of Taney, should have signed his own name as a witness to Taney's signature.

2.—Taney should have declared to the subscribing witnesses that he had caused his name to be signed to the paper, and that he adopted the signature as his own.

The first point is not well taken. It is true that various sections of the Civil Code provide that the person writing the name of another must subscribe the paper as a witness, but Sec. 1278 expressly exempts wills from the operation of the other sections.

As to the second point: Various decisions have been cited to sustain the views offered by the respective counsel. The Massachusetts, Virginia, and English cases apparently sustain the proponent; but as those cases were decided under statutes differing from ours, they lose their apparent weight. The statute of New York is nearly, if not quite, identical with ours; and under that statute two cases (1 Kernan, 220; 10 Paige, 85) have been decided which clearly sustain the views of the contestant.

Our statute requires four distinct facts to exist in order that a will be valid (Sec. 1276, Civil Code), viz:

1—It must be subscribed by the testator, or by some person in his presence, and by his direction.

2—The subscription must be made in the presence of the testator, *or be acknowledged by the testator to them to have been made by him, or by his authority.*

3—The testator must declare the paper to be his will; and,

4—Two attesting witnesses must sign their names.

The Legislature has made each one of these four facts as essential as either of the others; therefore, it is as essential that the signature, if not made in the presence of the witnesses, be acknowledged to them, as it is that the paper be signed at all. The Court is not at liberty to ignore either of the four requirements. It was argued that his request to the witnesses to witness the will was equivalent to an acknowledgment that the paper then produced contained all the requisites of a valid will, including the acknowledgment of his signature. That cannot be so, for his acknowledgment of a fact that did not exist would not bring the fact into existence, no more than would his acknowledgment of one fact be an acknowledgment of another fact. It was necessary that the attention of the witnesses should have been called directly to *the signature*.

Order made denying probate.

ESTATE OF JOHN H. MOLK.

No. 8483—November, 1878.

DEVISE.—PRECATORY WORDS.—The words, "To my beloved wife the whole of my property, for her own use and benefit and *to maintain and support my said children with*, the same to be hers absolutely," do not create a trust, but vest the wife with the absolute estate.

Construing section, C. C., 1922.

T. F. Bachelder, for executrix.

The estate is ready for distribution, and the clauses in the will relating to the question for consideration are as follows:

"Fifthly. To my beloved wife I hereby entrust the care, education, and maintenance of my beloved children until they shall arrive at the age of maturity, and be able to support and maintain themselves.

"Sixthly. I give and bequeath unto my beloved wife, Anna Margaretha Molk, the whole of my said property above mentioned for her own use and benefit, and to maintain and support my said children with; the same to be hers absolutely."

The question is, whether these words create a trust for the benefit of the children, or whether the widow is entitled to distribution of the entire estate to herself.

By the COURT: The words used as to the children are precatory words, of recommendation and confidence only, and do not create a trust. The entire estate should be distributed to the widow in fee.

ESTATE OF MARY WRIGHT.

No. 7981—November, 1878.

BEQUEST to a religious corporation is void, under Sec. 1275, C. Code.

Construing section, C. C., 1275.

L. S. Clark, for the executor.*J. G. Maguire*, for M. L. Joseph, legatee.*F. Kennedy*, for the Religious Society.

The second clause of the will is as follows:

“I give and bequeath to the Colored Episcopal Church of the City and County of San Francisco, State of California, the sum of four hundred dollars.”

The residue of the estate is given to Maria L. Joseph for life, remainder to her children; and if the children do not survive her, then remainder to the said church.

At the time of the death of testatrix a society existed in the City and County of San Francisco, known as the Colored Episcopal Church, organized for religious purposes. The society was not then incorporated, but has since become so.

By the COURT: By the law of this State, no religious corporation, body or society, can take under a will. (Civil Code, Sec. 1275.) Therefore the clauses of the will attempting to give property to the church are void.

ESTATE OF JULIUS GLASS.

No. 7726—November, 1878.

DEVISE.—PRECATORY WORDS.—“To my beloved wife, Emelie Glass, to have and to hold the same or any parcel thereof, with privilege to dispose of the same or any portion thereof, for her use and interest, *or those of our beloved children.*” constitute the wife, devisee, a holder of the estate in fee and full property. The language is precatory, and cannot be held to create a trust in favor of the children.

Construing sections, C. C., 1322-25.

M. Rosenthal, for the widow.

The estate being ready for distribution, the following clause of the will is for construction:

“Thirdly. I leave all I may die possessed of, in personal or real property, * * to my beloved wife, **Emelie Glass**, to have and to hold the same, or any parcel thereof, with privilege to dispose of the same, or any portion thereof, for her use and interest, or those of our beloved children.”

By the COURT: The testator evidently intended by these words to give the estate to his wife, and to authorize her to dispose of it and its proceeds as she should deem proper, and not to create a trust for the benefit of the children. That intention is in harmony with the words. The words are precatory only. The estate should be distributed to the widow.

ESTATE OF MARY CUNNINGHAM.

No. 7160—Dec. 5, 1878.

PRACTICE.—CONTEST ON PROBATE OF WILL.—The right of heirs to revoke probate of will within the year specified, is the same whether the issues were tried by a jury or by the Court sitting without a jury.

AN APPEAL from a probate works a stay of proceedings.

Construing sections, C. C. P., 946, 1327.

Robert Ash, for the husband.

J. F. Sullivan, for absentees.

Two papers were offered for probate; each claimed to be the last will. One appointed Rev. H. Gallagher to be executor, and gave the property to certain non-residents, heirs of deceased. The other appointed Patrick Cunningham, husband of the deceased, to be executor, and gave him all the property. A trial by jury was had, which resulted in sustaining the will in favor of the husband, and a decree was made, admitting that will to probate, and denying probate of the other paper. Upon the trial the Court appointed an attorney to represent the non-residents; and the attorney so appointed participated in the contest.

H. Gallagher gave notice of appeal, and filed a three hundred dollar bond. The non-residents then employed as their attorney the same gentleman who had been appointed, who, within a year, on their behalf, and as their attorney by employment, filed their petition for revocation of the probate of the will which had been admitted. On return of the citation, the executor, Cunningham, objected that pending the appeal the proceeding was stayed. The objection was sustained by the Court. Thereupon, H. Gallagher dismissed his appeal. Cunningham then objected, that the probate of the one will, and the denial of the probate of the other, were proceedings *in rem*, and the verdict of the jury was conclusive; that the sections of the Code giving heirs right to contest the probate within a year do not refer to contests tried before a jury.

By the COURT: The effect of the trial was the same, whether the issues were tried by a jury or by the Court. In either case, the heirs have a year in which to move the revocation of the probate.

Objection overruled.

ESTATE AND GUARDIANSHIP OF IRMA LINDEN.

No. 8767—Dec. 12, 1878.

CUSTODY OF THE PERSON OF A MINOR.—The father is entitled to such custody, as against any person other than the mother; subject, however, to the paramount duty of the Court to consider in awarding such custody, whether it will be "for the best interest of the child in respect to its temporal and its mental and moral welfare."

A father, by leaving a child for any period in the care and custody of another, does not, by that act alone, forfeit his right to re-enter upon his right and duty.

In granting letters to the father, the Court may incorporate in the order such stipulations and directions binding the father in the matter of the personal custody of the child, as may befit its temporal and moral welfare.

An unsettled mode of life and a harsh disposition are matters to be considered in the light of objections to the granting the custody of a minor to a father when a happier mode of disposing of the child offers itself.

Construing sections, C. C., 197, 213, 246, 251; C. C. P., 1751, 1755.

M. C. Blake, M. A. Edmonds, and M. B. Blake, attorneys for Mr. and Mrs. Barker.

Warren Olney and F. E. Sutherland, attorneys for Mr. Linden.

By the COURT: The facts are as follows:

Mr. Linden is a native of Germany; he is by calling a music teacher, and is now about 46 years of age. About 25 years ago, he came to this State, and after remaining some time went to Australia, where he married, and the three elder children hereinafter named were born. From Australia he came to San Francisco, bringing with him his three children, and engaged here in his profession.

In June, 1870, he married Miss Anna H. Giles, a resident of this city, who was the only sister of the petitioner, Mrs. Barker.

Mr. and Mrs. Linden resided together in this city until August, 1871, when Mrs. Linden went to Germany, taking with her the three children by the former marriage, Mr. Linden remaining here.

The child Irma was born in Germany, February 23, 1872, and Mrs. Linden died March 5th, following. Before her death, Mrs. Linden requested that in the event of her death her child should be placed with her sister, Mrs. Barker.

In November, 1872, the child reached this city, and was met by Mr. Linden and Mrs. Barker, and was, with the consent of Mr. Linden, taken by Mrs. Barker to her own home, where she has ever since remained, under the care of Mrs. Barker. Mrs. Barker received from Mr. Linden various sums for her expenses, until about two years ago, when she declined to receive any further sums; but several hundred dollars were placed in savings banks for the child.

About June, 1876, Mr. Linden married the third time, and with his wife went to Germany; they returned in December following, since which time they have not resided together. He is at present unmarried. In February, 1877, Mr. Linden, with his eldest daughter, left this city and went to Australia, and returned therefrom in April, 1878.

The family of Mr. and Mrs. Barker has consisted of themselves, a son about a year older than Irma, Irma, and a servant. Mr. Barker is in comfortable financial circumstances; and he and his wife are unexceptionable people. The care Mrs. Barker has bestowed upon Irma has been unremitting; most excellent people are unqualified in their commendations of that care. Irma has never known any other mother, and is very much attached to Mrs. Barker. She is a very bright, beautiful child. Indeed, no question was made on the trial as to the prudence and care of Mrs. Barker in the physical and moral training of Irma. During the times that Mr. Linden was in this city, he had unlimited access to his child and to the house of the Barkers. His visits were usually about once a week.

Before going to Australia in February, 1877, Mr. Linden had an interview with Mrs. Barker, in which she reminded him of a promise he had made to her that the child should remain with her, and asked him to put it in writing; he declined to do so, but told her that he would not take the child from her, and that she could remain with her as long as both lived.

It was on this occasion that Mrs. Barker declined to receive any further aid in Irma's support. After his return from Australia in April, 1878, Mr. Linden called upon the Barkers and saw the child. Prior to that time the relations of the father and uncle and aunt had been apparently of the most friendly kind, and he had acquiesced fully in their treatment of the child.

On that visit, the child did not meet him as cordially and enthusiastically as he had expected, and he, believing that the Barkers were endeavoring to wean the child from him, then determined to remove her from their care; but this resolution was not then communicated to them.

He continued to visit them from time to time, until, about the middle of October last past, he announced to them his determination to return to Australia and take the child with him, and demanded that they have her ready to sail with him in a steamer of a near day, in which, he said, berths were engaged.

They refused to deliver the child, and filed their petition Oct. 28th.

The other children of Mr. Linden are, Charles, aged 19 years, at present in business at the South Sea Islands; Henry, aged 18 years, now and for some years at school in Germany; and Ottilie, aged 16 years, now boarding in this city. Mr. Linden has continued to follow his profession as teacher of music, with varied success as to pecuniary results, but sufficient to provide support for those dependent upon him. During the period since his first marriage he has kept house only about twenty months; the remainder of his life has been passed in hotels and boarding houses.

Since Irma's mother went to Germany, in 1871, none of his children have lived with him; he keeping them at boarding schools or elsewhere, and living by himself. He is of a nervous and irritable temperament and harsh disposition; not to such an extent, however, as to render him unfit to perform the duties of a father.

Said minor had no guardian heretofore appointed by will or deed or otherwise.

Petitioners make the following points:

1—That Mr. Linden has voluntarily relinquished the care and custody of the child and abandoned his parental rights, and cannot now be heard to claim her.

2—That he is of such a nervous and irritable temperament, ungovernable temper, and harsh disposition, that he is unfit to assume the control of the child.

3—That the moral, physical, and mental well-being of the child requires that she be permitted to remain with them.

Referring to the first point, I very much doubt if a parent can be said to *relinquish* his position as such, except in the two cases of adoption and apprenticeship, the rules controlling which cases do not apply to this case. He may temporarily part with the custody of a child, and he may surrender his right to its earnings; but he cannot discharge himself of the duty he owes (to the child) of protection and maintenance. The good of the child requires that there be some person who is legally bound to it. I have no doubt that Mr. Linden, desiring to avail himself of Mrs. Barker's

care and affection for the child, in order to secure a good home for it, permitted her to believe that it would remain with her; that his little child, on his return from Australia, did not understand how enthusiastically he wished to be received by it; that he was annoyed, and determined to remove it; that he was actuated rather by caprice than by a tender, fatherly feeling; yet I do not believe that there has been a relinquishment of parental duties. If Mrs. Barker had neglected the child, the father would certainly have had the right, as it would have been his duty, to investigate and remedy such neglect.

As to the temper of Mr. Linden, it is true he is irritable and harsh; but he has not alienated his eldest daughter, who seems quite attached to him. As to his temper being ungovernable, I think it rather the reverse; witness, the three circumstances testified to, where the persons to whom he was rude were, in two instances, women, and in the other, a harmless, inoffensive man. These selections of objects of rudeness display entire self-control and considerable prudence.

As to the third point, Sec. 246, Civil Code, is as follows:

“In awarding the custody of a minor, or in appointing a general guardian, the Court or officer is to be guided by the following considerations:

1. By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child be of a sufficient age to form an intelligent preference, the Court may consider that preference in determining the question.

2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right; but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor and business, then to the father.

3. Of two persons equally entitled to the custody in other respects, preference is given as follows: 1.—To a parent,” etc.

Sec. 1751, Code of Civil Procedure, reads:

“The father of the minor, if living, and in case of his decease, the mother, while she remains unmarried, being themselves respectively competent to transact their own business and not otherwise unsuitable, must be entitled to the guardianship of the minor.”

It is not necessary at this time to enter upon a dissertation on the law relating to the alleged prerogatives of a husband and father; his superiority as head of the household; his authority as parent; the exercise of his will as law. It is sufficient that the statutes of this State plainly announce the principles which are to govern a Court in disposing of the custody of minors. The leading, paramount principle is, “what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare.” As between two persons otherwise equally well fitted, a parent should be preferred; because the law presumes that a parent, actuated by love, will render greater service to a child, and teach it the important duties (important to the State as well as to the individual) of filial love and respect.

Apply these principles to the case at bar. Mr. Linden is at present a single man. He has no home, except such as he may temporarily have at a hotel or boarding house. The child Irma has never lived with him, even for a day. He has never had any of his children with him except during the time he lived with Irma's mother. There are no especially tender heart-strings to snap by his living apart from the child now. Irma is now of an age to require especial care, such as a woman only can give. The time from 6 to 16 years of age is the most important in the life of a female. Mr. Linden could not, of course, give his personal attention to her; and his elder daughter, though doubtless a very estimable young lady, refined and accomplished, has scarcely sufficient age or experience to direct and control a young child. Mr. Linden is, himself, entirely unsettled as to his future movements. Before the trial he announced his determination to go to Australia; on the trial he said he did not know where he should be, whether he should remain here or go

abroad. On the other hand, the Barkers have a comfortable home; they have had Irma six years; she is attached to them and they to her; she knows no home but theirs; their care and management of her have been unexceptionable; if she were to leave them she could gain no better home, temporarily, mentally, or morally; while great risks would be run by a change; she would have to part from her present friends and find new associations. I am of opinion that a child should, so far as possible, have the influences of home life; that the State is interested in having those influences surround and impress its future citizens. I am, therefore, of opinion that Mr. Linden is not at present so situated as that he can provide for the child as good a home as she has had and now has; it appears to me "for the best interest of the child in respect to its temporal and its mental and moral welfare," that she should remain with the Barkers and be in their custody and under their immediate control and direction. I am of opinion that Mr. Linden's desire to remove the child from the Barkers came rather from caprice and selfishness, than from parental love and desire for his child's best interests.

Sec. 251, Civil Code, reads:

"In the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the Court."

Mr. Linden in his petition asks that letters be issued to him, if letters should be adjudged to be necessary. It is proper that letters of guardianship should issue. Therefore, he may have thirty days, from this day, within which to elect whether he will take letters, and to take them; such letters to be upon, and to express the following conditions and directions, and the following regulations are given for his management of the person of the child, viz:

That the child, Irma, be not removed by him or any other person from the custody of Mrs. Barker; that Mrs. Barker have the custody, control, and management of the child; that Mr. Linden and his three elder children have the privilege at all seasonable times of visiting Irma; and that

Mr. Linden pay to Mrs. Barker \$20 per month for her food and clothing. If Mr. Linden shall omit for said period of thirty days to take out the letters, on the conditions above specified, letters will then issue to the petitioners, Mr. and Mrs. Barker, and contain the direction that they permit Mr. Linden and his elder children to visit Irma at all seasonable times.

In either case, the bond to be given by the person qualifying is fixed at \$1,000.

In the meantime, the child will remain, as heretofore, in the custody of Mrs. Barker:

Let an order be drawn accordingly.

ESTATE OF JAMES OTIS.

No. 6748—January, 1879.

SALE OF REAL ESTATE.—Variance between written bid and order and notice of sale.

A purchaser who has filed a written bid which is, by its conditions, at variance with the order and notice of sale of real estate, but to whom the real estate has been confirmed, in accordance with his bid, is not entitled to have the decree of confirmation vacated and himself released from his contract on the ground of the variance.

Construing section, C. C. P., 1554.

McAllisters & Bergin, for executors.

P. G. Galpin, for purchaser.

The order for sale of the real estate, authorized the executrix and executor to sell, "at either public or private sale, as they shall judge to be most beneficial for said estate, for cash, or on a credit not exceeding one year, payable in gross or in instalments."

The notice given, inviting bids, stated that the sale would be "for cash, in gold coin."

The following bid was received:

"SAN FRANCISCO, October 2, 1878.

"*To Executors of the Estate of James Otis, deceased:*

"I offer, for sixty days, the sum of \$7,500 for the 50-vara lot 5, in block 238, Western Addition, with perfect title, and

free from all liens and incumbrances. Terms, one-third cash on delivery of deed, balance payable in two years, at 8 per cent. interest per annum, with privilege of paying off the whole, or part, before maturity; and for any sums so paid, a discharge to be given of so much of the land equal in value to amount paid. I enclose \$500 as a deposit.

“ L. S. B. SAWYER.”

Report of the sale was made, and notice of hearing given by posting. A decree made, confirming the sale to L. S. B. Sawyer, reciting as follows:

“ That at such sale, L. S. B. Sawyer became purchaser of said parcel of real estate, for the sum of seven thousand five hundred dollars, in United States gold coin, payable in manner following, to wit: One-third of said sum of seven thousand five hundred dollars, to wit: two thousand five hundred dollars, cash on delivery of deed therefor, and the remaining sum of five thousand dollars, with interest at the rate of eight per cent per annum, payable in two years, with the privilege of paying off the whole, or part thereof, at any time within said two years; and a discharge of the mortgage to be given of such part of said real estate as shall be proportionate to the amount of partial payment made, and the deferred portion of said purchase price to be secured by mortgage upon said parcel of land.”

L. S. B. Sawyer now asks that the order of confirmation be set aside, on the ground that the notice of sale did not conform to the order of sale, and that the bid contained provisions not embraced in the order.

By the COURT: The application of L. S. B. Sawyer is denied. In law, he had notice of the terms of the order of sale, and of the notice given; he, having such notice, put in such bid as he was advised. He had notice (by posting) of the hearing for confirmation, and, in contemplation of law, was present, making no objection. He cannot now be heard to say that the bid and confirmation were not according to the notice. Whether or not the title would pass, is not now considered; neither is it considered whether the order of confirmation would be sustained on appeal. It is only con-

sidered that the motion of the purchaser to vacate the order of confirmation cannot be sustained.

ESTATE OF ADA WARDELL.

No. 6959—January, 1879.

WILL.—PRETERMISSION OF ILLEGITIMATE CHILD.

An illegitimate child inherits from her mother, (there being no mention of her in will), as pretermitted child.

Construing sections, C. C., 1307, 1387.

M. B. Blake, for C. McCausland, claiming as heir.

H. A. Powell, for devisees.

Geo. N. Williams, for executor.

Ada Wardell died testate, leaving her surviving a husband, two children by a former husband, and the petitioner, Cornelia McCausland, her illegitimate child. The will bequeaths and devises all the property to her husband and the two children by the former husband; no reference is made in the will to the petitioner, Cornelia McCausland.

The question for consideration is, whether the illegitimate child takes a share in the estate.

Sec. 1307, provides that when any testator omits to provide in his will for any of his children, unless it appears that such omission was intentional, such child must have the same share in the estate as if the deceased had died intestate.

It is argued, for the devisees, that the words "children" and "child" in this section are to be construed so as to include those only who were known to the common law as being within the meaning of the words; and as at common law an illegitimate child did not inherit from either parent, and was the child of nobody, such child is not within the section referred to.

It is not necessary to go to the common law for a rule by which to construe this section. Sec. 1387 of the same Code,

provides that "every illegitimate child * * is an heir of his mother, and inherits her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock."

If the petitioner had been born in lawful wedlock, she would have taken, under Sec. 1307, the same share that she would have taken if her mother had died intestate; and under Sec. 1387 she takes the same, being illegitimate. She is to take "in the same manner;" that is, *as if* she had been born in lawful wedlock.

Let a decree be drawn.

ESTATE AND GUARDIANSHIP OF SECCHI MINORS.

No. 5165—January, 1879.

ACCOUNT.—Moneys received by guardian in a foreign jurisdiction must be accounted for here by guardian unless he shows positively that he has accounted for the same funds abroad, any presumption arising being, that the foreign authorities have permitted the transfer of the funds hither for the purpose of having them subject to the jurisdiction of the common domicile of guardian and wards.

Construing sections, C. C. P., 1773-4.

J. M. Burnett, for guardian.

E. N. Deuprey, contra.

By the report of the referee it appears that the guardian received rents of the real estate of his wards. He also received moneys of the wards in France under the following circumstances: The father of the wards, (a resident of this city and county) died leaving some property in France. A council of relatives was had there, at which it was agreed that Good should receive the moneys of the minors, he being their testamentary guardian here. He received the money and invested it in goods, shipped the goods to this city, and on their arrival here used the same in his business and mixed the proceeds, and the other moneys of the wards, with his own funds.

It is now contended that the guardian cannot be charged, in the settlement of his accounts in this State, with the moneys received by him in France; that it is to be presumed that he is responsible to the tribunals of the country where he received the money; and that, to hold him accountable here, would subject him to two jurisdictions, each entirely independent of the other.

18 How., 16; 1 Bradford, 345; 4 How., 497; 3 Met., 109; 20 N. Y., 103; Story on Conf., Secs. 529, 514.

By the COURT: By bringing the property to this State, the guardian subjected himself and it to the jurisdiction of this Court; and he must account in this Court, at least, unless he shows that he has actually accounted in the foreign jurisdiction and been relieved of his obligation. In the absence of a showing, this Court cannot presume that he has accounted in France. His duty in this State is to properly manage the property of his ward in this State. If there be any presumption at all, it is that he, by permission of proper authority, transferred the property to this State for the purpose of having it under the control of the Court where the wards reside.

Objection overruled.

ESTATE OF A. H. ROBIE.

No. 8815—Jan. 9, 1879.

LETTERS OF ADMINISTRATION.—PERSONS ENTITLED.—As against the Public Administrator, under section 1365, C. C. P., the nominee of a widow, though she be a non-resident, is entitled to the preference in the issuance of letters as a matter of right, the Court having no discretion in the premises.

Construing sections, C. C. P., 1365-69.

Greathouse & Blanding, for J. B. Haggin.

R. H. Lloyd, for Public Administrator.

Deceased, a resident of Idaho, died intestate, leaving some \$33,000 in this city and county. His widow and children are residents of Idaho. His widow requested, in

writing, that letters of administration issue to J. B. Haggin. William Doolan, Public Administrator, opposed Haggin's application and petitioned for letters to himself.

By the COURT: Under Sec. 1365, C. C. P., the nominee of the widow is entitled to letters before the Public Administrator, even if the widow be a non-resident. He has, by virtue of her nomination, a place in the list. Haggin, being a resident, and having the widow's nomination, is entitled to letters. Sec. 1379 does not apply to a case like the present, but to cases where the party is not of right entitled. Under Sec. 1365, there is no discretion, but a right. Sec. 1365 is not affected by Sec. 1369, because the nominee has as much a place in the list as if he were placed there as No. 2; and the non-residence of the husband or wife does not at all effect his or her right to make the nomination. By no other construction can Sec. 1365 have any effect whatever.

ESTATE OF JEAN FLEURY.

No. 8025—Jan. 12, 1879.

FAMILY ALLOWANCE.—CHATTEL MORTGAGE ON PERSONAL PROPERTY TO WHICH WIDOW IS ENTITLED, FOR MAINTENANCE.—COURT MUST ALLOT IT TO WIDOW AND IGNORE LIEN.

The widow asks that certain household furniture, on which there is a chattel mortgage, should be set apart to her. The mortgage holder objects, and prays that it be sold to satisfy the lien.

The Court must deliver the property to the widow and leave the creditor to enforce his claim elsewhere.

Construing section, C. C. P., 1465.

Pringle & Hayne, for administratrix.

Benj. Teal, for mortgagee.

Deceased left a widow. His estate consisted of household furniture, appraised at \$800. The widow asked that the property be set apart to her. The furniture was subject to a mortgage executed by deceased. The mortgagee objected, and asked that the property be sold and the proceeds applied on the mortgage debt.

By the COURT: The statute providing for the application of proceeds of sale upon a mortgage debt refers to real estate, and not to personal property. The chattel mortgage cannot be foreclosed in this Court. The widow is entitled to her order setting apart the property, and if the mortgagee has a remedy, he must pursue it in another Court.

ESTATE OF MICHAEL J. SAMUEL.

No. 8755—Jan. 15, 1879.

JURISDICTION.—RESIDENCE INFERRED FROM THE ACTS OF DECEDENT. HIS CONFLICTING ASSERTIONS AS TO HIS INTENT.

Decedent, who died in this city and county, had a farm at Livermore; but for certain secondary objects, had his name enrolled on the Great Register here, and voted here; also, became member of a lodge, wherein residence here was essential; and he made declarations to that effect. Sometimes, he spoke of Livermore as his home; sometimes, of San Francisco. There were reasons for the Court to believe that his declarations as to his residence in San Francisco were not sincere; and that his entry on the Great Register was a fraud by him.

HELD, that Alameda County was his residence; and that proceedings here should be vacated.

Construing sections, Pol. C., 52; C. C. P., 1294.

C. Seeber and M. Rosenthal, for Wm. Doolan.

N. Hamilton, for C. B. Rutherford.

Deceased died in this city and county, October 20, 1878, and letters of administration were granted to Wm. Doolan, Public Administrator of this city and county.

C. B. Rutherford, Public Administrator of Alameda County, petitions for the revocation of the letters to Doolan, and that no further administration be had, on the ground that deceased was at the time of his death a resident of Alameda County.

Facts: Deceased had been for years a resident of Livermore, Alameda County. He was a peddler, having a small store-room as headquarters, and travelled through the country with his wares. In 1866 he purchased a small tract of land, and carried on farming in a small way; had some horses and

some chickens. In the same year he endeavored to join a society in Livermore; he was unsuccessful, and, for the purpose of being able to represent himself a resident of San Francisco, came to this city and applied to have his name placed on the Great Register as a voter, stating in his application that he was a resident of this city and county. He was placed on the Great Register, and voted in this city and county at the general and judicial elections of 1877, and at the constitutional election of 1878. In the spring of 1878, a school election was held at Livermore; he offered to vote, and on his vote being challenged, withdrew it. He obtained admission to a lodge of Odd Fellows here, his application stating him to be a resident here. The most of his time was spent in and about Livermore; he came to this city frequently, say about once a week, remaining a day or two. When here, he had a room at the Prescott House; but it does not appear that he had a room except when here. To several persons in Alameda County, he spoke of Livermore as his "home;" to other persons he said he lived in San Francisco; that he would not live in such a place, referring to Livermore.

By the law of this State, a person cannot have two places of residence; he does not lose his residence at one place until he has acquired a residence at another; residence is a mixed question of act and intent; the Political Code defines a residence to be "the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose."

I am of opinion that Samuel did not change his place of residence from Alameda County to this city and county. The oath which he took to get his name on the Great Register here was a false oath, and his statements as to his residence here were false statements, for the purpose of imposing upon the society which he wished to join. He did not return to San Francisco "in seasons of repose," but whenever he was here, he was here for temporary purposes only.

The petition of C. B. Rutherford for revocation of the letters to Wm. Doolan, and that no further administration be had in this city and county, must be granted.

ESTATE OF CORNELIA M. POST, MINOR.

No. 6683—Jan. 17, 1879.

- INVESTMENT OF FUNDS.—1. Guardian is not responsible for the loss of funds occurring by reason of his depositing them for safe-keeping in a bank, except when it was known that such bank was unsafe.
2. When, however, a guardian loans out funds imprudently and without security, it is his duty to assume the loss.

Construing section, C. C., 2261.

H. E. Highton, for guardian.*W. C. Burnett*, for ward.

The ward attained majority July 6, 1876, and the guardian, at her instance, has rendered his account for settlement, to various items of which the ward has filed written objections.

The guardian had deposited the sum of \$562.57 with the Pioneer Land and Loan Association. That institution failed, September 17, 1877, and the money became lost. There was no evidence offered that this was an improper place of deposit. The ward, after becoming of age, knew of the deposit, and made no protest. The objection is therefore overruled.

All the other objections are overruled, except the following, viz:

In the account, the guardian places to his credit the following item:

“1876, April.—By cash paid ward (by Mrs. H. Bean), \$850.”

The guardian testified upon the hearing that he loaned this amount to Mrs. Bean, step-mother of the ward, upon her promising to give security by mortgage; that after receiving the money she failed to give the security, and he has been unable to collect the money.

Mrs. Bean testified that the transaction was not a loan, but that the guardian was indebted to her, and that the money was paid on account of that indebtedness.

The ward has been supported for some time by Mrs. Bean, and the guardian insists that if the item cannot be otherwise placed to his credit, it should be treated as money

paid to Mrs. Bean for the support of the ward. Mrs. Bean, however, does not ask for compensation.

In deciding the point in controversy, it is not necessary to pass upon the conflict in the testimony of the guardian and Mrs. Bean. In either case, he is responsible for the money. In making a loan or investment, except under order of Court, the guardian takes the responsibility. If he made the loan without first having the security, he did not act as a prudent person would act. If he paid the money on account of his own debt, of course he is liable. Neither will this Court adjust the difference between the two, as to the compensation for the support of the ward, and give the guardian credit for paying money to Mrs. Bean on an account which she never has claimed.

Let the account be settled, sustaining the objection to the item of \$850, and overruling the objections as to all other items.

Being requested to give findings upon the subject of the conflict of testimony regarding the item of \$850, I find from the testimony that the guardian, in April, 1876, loaned \$850 to Mrs. Bean, she promising to give to him her promissory note for the amount, secured by mortgage; she intending to use the money in the purchasing of a lot, and the mortgage was to be upon that lot. She used the money in the purchase of the lot, but neglected and refused to give her note for the money.

Mrs. Bean is sister of the guardian. At the time of the loan, the guardian and Mrs. Bean were residing together in the same house, on friendly terms; but after the loan and refusal to give security, they became estranged.

ESTATE OF ORMSBY HITE.

No. 6825—Jan. 22, 1879.

DISTRIBUTION.—ASSIGNEE OF DECEASED HEIR ENTITLED TO HAVE ASSIGNED PROPERTY DIRECTLY DISTRIBUTED TO HIM, IN SATISFACTION OF A DEBT HELD BY THE ASSIGNEE AGAINST HEIR AND SECURED BY SUCH ASSIGNMENT.

But the Court cannot, to facilitate the transaction, order a sale of any real estate; as that would be in the province of the Court having jurisdiction of the estate of the deceased heir.

Nor can the Court distribute property to the holder of an assignment coupled with a defeasance in case of payment of the debt; inasmuch as such a transaction would be more in the nature of a mortgage than of a divesting of legal title.

Construing section, C. U. P., 1678.

Cowles & Drown, for administrator.

Pringle & Hayne, for assignee.

Deceased died intestate November 5, 1875, leaving his father his sole heir. The father, being indebted to A. M. Gazlay and Harvey Yeaman, late partners, in the sum of \$854.45, made an assignment in writing to Gazlay and Yeaman of the property of said estate, to pay said indebtedness, and gave to them an order upon the administrator to pay to them said amount and interest thereon from February 12, 1876, at the rate of six per cent. per annum, and the expenses of collection. The writing contained a clause that "upon the payment of said debt, interest and expenses, by said administrator, or otherwise, to said Gazlay and Yeaman, their heirs and assigns, this deed shall be void." The father died August 24, 1876, leaving his wife and daughter his sole heirs. Yeaman has since died, and an administrator has been appointed, who joins with Gazlay in the petition that the amount of the debt, interest, and costs be distributed to Gazlay.

By the COURT: The writing was an assignment, at least to the extent of the money on hand, from the father to Gazlay and Yeaman of sufficient to pay the debt, interest, and expenses of collection, and Gazlay, as surviving partner, is entitled to distribution of the same. The widow and daughter of the father are entitled to distribution of the

balance of the property. It is not clear that this Court can order any of the real estate to be sold for the purpose of paying this indebtedness of the father, as the father's estate is not under administration; nor can this court distribute the real estate to Gazlay, or any interest therein, on account of the defeasance in the writing.

ESTATE OF UBALDO SELNA, JR.

No. 7524—Jan. 27, 1879.

DEVISE.—A FUTURE CONTINGENT INTEREST VESTS IN BENEFICIARY SO AS TO BE THE SUBJECT OF A SUCCESSION.

ADMINISTRATOR'S ACCOUNT.—The account of an administrator cannot be settled until there has been an appraisal of the property in the inventory on file.

Construing sections, C. C., 678, 680, 688, 690, 693-5, 699, 1384.

George & Loughborough, for administrator.

Ubaldo Selna, senior, died testate, leaving him surviving a widow and two sons, Primo and Ubaldo. The will, after making some money legacies, devised and bequeathed all the remainder of testator's property to David Porter and Peter A. Gianinni, in trust, to hold, manage, and invest the same for and during the life of his mother, Pavola Selna, and from the income thereof to pay her twenty dollars per month until her death, and the remainder of the income to pay or expend for the use of said sons; and "from and after the death of my said mother, I do give, devise, and bequeath all the said rest, residue, and remainder of my property, and all accumulations thereof, if any, and all the property into which the same, or any part thereof, may then have been converted or invested by said trustees, or either of them, unto my said sons, Primo and Ubaldo, share and share alike."

The estate of Ubaldo Selna, senior, has been administered and distributed to the trustees upon the trusts named in the will. The entire amount thus distributed in trust was about \$37,000, on deposit in various savings banks, which amount has ever since been and is held by the trustees. Said Ubaldo

Selna, junior, died December 21, 1876, under six years of age. Pavola Selna, the mother of Selna, senior, is still living.

Upon the request of the mother of Ubaldo Selna, junior, letters of administration of the estate of said child were granted to David Porter, one of the trustees under the will of Selna, senior, and an inventory (but no appraisal) was returned, in which the property is stated to be in substance as above set forth, being the undivided one-half of about \$37,000, in the hands of said trustees as aforesaid, and being expectant upon the death of said Pavola Selna, now living. The administrator has rendered his account for settlement, in which he charges himself with nothing received, stating the same facts as to the interest of the deceased child, and credits himself with paid clerk's fees, etc., \$13.50; physician's bill, \$25; burial expenses, \$634 50; administrator's commissions, \$850, and attorney's fees, \$500; and asks that the account be settled and the interest of the deceased child in the trust fund be distributed, one-half to the mother of the child, and the other half to his brother Primo.

The point for consideration is, whether the child, Ubaldo Selna, junior, had such an interest, at the time of his death, in the funds in the hands of the trustees, under his father's will, as could be administered upon and distributed to his heirs at law.

The following are the provisions of the Civil Code, bearing upon the subject:

Sec. 678. The ownership of property is either:

1. Absolute; or, 2. Qualified.

Sec. 680. The ownership of property is qualified:

2. When the time of enjoyment is deferred.

Sec. 690. A future interest entitles the owner to the possession of the property only at a future period.

Sec. 694. A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the intermediate or precedent interest.

Sec. 695. A future interest is contingent whilst the event upon which it is limited to take effect remains uncertain.

Sec. 699. Future interests pass by succession, will, and transfer, in the same manner as present interests.

Sec. 1384. The property of one who dies intestate passes to the heirs of the intestate.

Under these provisions, the interest of Ubaldo Selna, junior, in the property left by his father's will to the trustees, and the unexpended income thereof, was, in his lifetime, a vested future contingent interest; which upon his death passed by succession to his heirs, viz: his mother and brother.

The account of the administrator cannot be settled until the value of the estate at the time of the death of Ubaldo, junior, shall be ascertained; the commissions will depend upon that value. The item, \$25 for services of physician, will be disallowed, the mother of the child being liable for that; and the item of attorney's fees will be reviewed.

ESTATE OF FRANCIS BLEAKLEY.

No. 6457.

CLAIM against estate.—INTEREST on.—Waived by a stipulation of waiver endorsed on claim of any demand beyond a sum named.

Construing section, C. C. P., 1490.

Cowles & Drown, for claimant.

M. Cooney, for executor.

Testator died; J. B. Gregory presented his claim March 23, 1876, duly verified. The body of the claim reads as follows:

“To moneys collected by deceased as my agent, and in gold coin, prior to August 25th, 1871, and which amount I had supposed, until since the death of Mr. Bleakley, was

loaned to John Parnell,	-	\$5,000 00
Interest on above at 10 per cent. per annum from		
Aug. 25, 1871, to May 20, 1875,	-	1,872 76
May 20, 1875, to amount of collections (gold coin)		
made by deceased to May 20, 1875,	-	2,794 00
		<hr/>
		\$9,666 76 "

March 23, 1876, the executor allowed the claim at \$5,294, which was approved.

The following is endorsed on the claim:

"In consideration of approval of this claim for \$5,294, I hereby waive all claims against said estate of F. Bleakley, deceased, and accept the same in full settlement and discharge of all further claims and demands against said estate, and his heirs and assigns, and the within claim as presented.

JAMES B. GREGORY.

Attest, M. Cooney."

The claimant moves the Court that the executor be ordered to pay the amount allowed, with interest from date of allowance.

By the COURT: The endorsement on the claim must be treated as a waiver of all claims and demands beyond the sum of \$5,294. It may not be necessary that a claim shall state that interest to accrue will be charged; but the claim for interest is a demand, and as such was waived. It is apparent, also, that the claimant intended to waive interest from the fact that in the claim interest was computed only to May 20, 1875, which was ten months prior to the presentation. Besides, too, we are not advised but the interest as claimed was allowed in full, and the deductions made on the principal; if so, interest would not bear interest.

Application for payment of interest denied.

ESTATE OF MARGARET AUSTIN.

No. 8946—Feb. 15, 1879.

RESIDENCE of deceased as affecting jurisdiction of estate.

WIFE'S RESIDENCE the same as the husband's.

TWO PLACES OF SOJOURN.—A narrative of facts upon which the Court fixes the place of residence.

Construing sections, Pol. C., 52; C. C. P., 1294.

J. M. Allen, for Public Adm'r of San Francisco.*Fox & Ross*, for Public Adm'r of San Mateo Co.

This is a controversy between two Public Administrators as to the place of residence of the deceased. The following are the facts:

Alexander Austin, husband of deceased, was for six years ending December, 1875, tax collector of the City and County of San Francisco, and resided therein. During that time he acquired a house and lot in the village of San Mateo, San Mateo County, the title to which was taken in his wife's name, and with his wife was in the habit of repairing to it for pleasure and recreation. After his term of office their habits were as follows: They had rooms continuously at a hotel in San Francisco, which they occupied, and where they boarded when not in San Mateo; Saturdays and Sundays they spent in San Mateo, having guests with them frequently; and often during the week they went to San Mateo daily, at evening, returning to this city in the morning; she sometimes on a later train than Mr. Austin; he was in constant business here, and when he was detained here over night she remained with him; the larger portion of the nights in the summer was passed in San Mateo, and in the winter in this city; when in San Mateo they had a maid servant, who did the housework, and when they were in this city the maid was with them; they had horses and carriage here and also at San Mateo; they employed there a gardener and coachman, who took care of the place in their absence. Mrs. Austin, in her illness, came to this city for medical treatment, and died here January 22, 1878. After her death Mr.

Austin did not go to San Mateo except on the day of his death in September, 1878, when he went there, and died by his own hand. Mr. Austin's name was on the Great Register of this city and county, and he voted here at the last presidential election. When in San Mateo, he frequently spoke of the place there as his home; and in this city he spoke of the hotel here as his home. I find, as facts, that Mr. Austin was to the day of his death a resident of this city and county; that the place in San Mateo was used by them as a place of resort for themselves and their guests for pleasure and recreation, and that in going to it, he did not intend to change his place of residence.

From the foregoing facts the conclusion of law is that Mrs. Austin at the time of her death was a resident of the City and County of San Francisco.

The motion to discontinue the proceedings for the probate of her will in this Court is denied.

ESTATE OF JEFFREY NUNAN.

No. 9111—May 8, 1879.

RIGHT TO ADMINISTER.—The Public Administrator has a right to administration only in cases of intestacy. In estates of testates, the Court has a discretion in the appointment.

Construing section, C. C. P., 1365.

E. W. McGraw, for Thos. Watt.

R. H. Lloyd, for Public Administrator.

Testator died in Canada, leaving estate in this State. His will has been probated in Canada, and an exemplified copy admitted to probate here. Margaret Stansall and Ellen Robinson, of Canada, are named in the will as executors; and upon their nomination and request, Thomas Watt, of this State, applies for letters of administration with the will annexed.

William Doolan, Public Administrator, also applies, claiming that the nominee of non-resident executors has no standing in Court, and that he is by law entitled to letters.

By the COURT: The Public Administrator has a right to letters only in case of intestacy. In this case, the Court may exercise its discretion, and does exercise it, by granting the application of Thomas Watt.

ESTATE OF ARTHUR PHINNEY.

No. 7919—May 8, 1879.

DEVISE of property subject at death of testator to mortgage. The devisee entitled to have the mortgage which bears interest paid out of the moneys of the estate under Sec. 1513, C. C. P.

Construing section, C. C. P., 1513.

E. B. & J. W. Mustick, for executors.

M. Lynch, for specific devisee.

Testator devised to Lottie P. Smith, his sister, a house and lot, which at the time of his death was subject to a mortgage to secure his debt. The devisee asks that the executors be required to pay the debt (which is interest bearing) out of the first moneys which may come to their hands which can be applied thereto. The creditor does not ask for present payment.

By the COURT: Under the authority given in Sec. 1513, C. C. P., and the estate of Woodworth, 31 Cal., 595, the devisee is entitled to the order.

Let a decree be drawn.

ESTATE OF GEORGE W. KIDD.

No. 9142—May 14, 1879.

BOND OF ADMINISTRATOR.—PROPERTY PLEDGED BY DECEDENT.—In fixing the amount of an administrator's bond, which should cover double the value of the personal estate, property of estate in the hands of a pledgee, should be rated at its value over and above the debt intended to be secured by the hypothecation, such value being the only interest which the estate can be said to have in the pledge.

Construing section, C. C. P., 1388.

Garber & Thornton, for administratrix.

George F. Baker and *C. Bartlett*, contra.

Letters of administration have been awarded to the widow of deceased, and the sum to be named in her bond came on to be fixed.

The deceased left a large estate, much of which consisted of personal property, embracing bank stocks, mining stocks, and other like property. He was largely indebted to various persons, and to secure the payment of the debts had pledged large quantities of stocks. The statute requires that the penalty of the bond "must not be less than twice the value of the personal property." It was contended, as against the administratrix, that the penalty of the bond should be double the value of all the personal property, as well that which was pledged, held by creditors, as that which would at once come to her hands. Upon her part, it was contended that the penalty should be fixed with reference only to property which will come to her hands; that the pledged property may never come to her hands, and that any other basis would place upon her an unnecessary burden.

By the COURT: A pledgee has an interest in the property pledged, as security for his debt; the interest of the estate in the property is the value of the surplus. The Court will not presume that the pledgee will waive his pledge and return the property to the administratrix. In determining the amount for which to require a bond, the rule should be to ascertain the value of the personal property which is unpledged, and the value of the surplus of the pledged property over the debts for which it is pledged. If, at any time hereafter, it becomes necessary to increase the bond, the Court has power to do so.

ESTATE OF CHARLES PATTON.

No. 5630—April 18, 1878.

MARRIAGE CONTRACT.—ACKNOWLEDGMENT, AN ESSENTIAL TO ITS EXECUTION.

DISTRIBUTION.—PROBATE COURT HAS A RIGHT TO CONSIDER A PROPERLY EXECUTED MARRIAGE CONTRACT IN DETERMINING MANNER OF DISTRIBUTING ESTATE.

CONTRACT AFFECTING FINAL DISPOSITION OF PROPERTY AS BETWEEN HUSBAND AND WIFE, LAWFUL.

A contract signed before marriage, but not acknowledged until eight years after.

HELD, to be a nullity (Hittell, General Laws, I, 3576.)

November 8, 1879.

HUSBAND AND WIFE.—SEPARATE PROPERTY.

Real estate (with its increased value caused by locality and surroundings), which was property of either party before marriage, is separate estate, notwithstanding the fact that community moneys have been expended thereon; but such expenditures may, in a proper case, be a claim chargeable upon such separate estate.

EXPENSES OF ADMINISTRATION when of a general nature should be assessed *pro rata* upon the community and separate estate of decedent. Expenses attaching specifically to particular pieces of estate should be chargeable against such estate.

MARSHALLING OF ASSETS for the payment of debts and legacies.

Construing sections, C. C., 158-9, 162-3, 178-9; C. C. P., 624, 645, 1665.

Mastick, Belcher & Mastick, and *H. C. Newhall*, for widow.

A. N. Drown and *F. J. French*, for residuary legatees.

M. B. Blake, for executors.

This is an application by the widow for partial distribution. The executors interpose an alleged marriage contract, by the terms of which the earnings and accumulations of each were to be separate property, subject to testamentary disposition. The widow objects to the contract, on the ground that it was not properly executed.

The contract was drawn by the deceased and signed by the parties a few minutes before the marriage, while the clergyman, parties, and guests were assembled for the marriage ceremony. It was not at that time acknowledged before an officer, but was acknowledged by them some eight years after the marriage.

By the COURT: The statute of this State, in force when this contract was signed (1 Hittell, 3576), required that "all

marriage contracts shall be in writing, and executed and acknowledged, or proved, in like manner as a conveyance of land is required to be executed and acknowledged or proved."

The contract must be complete in all its parts before the marriage. It must be in writing, signed and acknowledged by the parties. It was urged that as conveyances of real estate are good as between the parties without acknowledgment, a marriage contract is good as between the parties without acknowledgment. I do not concur in that view. The statute says that the marriage contract shall be acknowledged, or proved, in like manner as conveyances are required to be acknowledged or proved; which does not mean that it shall be acknowledged in like manner as conveyances are *not* required to be acknowledged. When a conveyance is to be acknowledged, it is to be acknowledged in a particular manner; and that is the manner in which *all* marriage contracts are to be acknowledged. As the alleged contract was not acknowledged, or proved, before the marriage, it is not a marriage contract, and has no validity as such.

The widow made other points, viz:

1. That the Probate Court has no jurisdiction to enforce the contract, if it be one; that a court of equity is the only court having jurisdiction.

2. That the contract is void, as against public policy.

Both these points must be decided against the widow. The Probate Court has jurisdiction to determine to whom an estate must be distributed; which may embrace the application of the terms of a contract. It is not against public policy for parties to contract as to what shall be community and what separate property.

November, 1879.

This is an application by the widow of Charles Patton, deceased, for distribution of one-half the community property to her, as survivor of the matrimonial community.

The answers of the executors and the residuary legatees under decedent's will, set up:

- 1st. An ante-nuptial contract between decedent and the petitioner, to the effect that all the property of each, whether

acquired before or after the marriage, is to be deemed separate property.

2d. That decedent's will undertakes to dispose of the *entire* property, and that the widow, being thereby put to her election, has heretofore elected to take under the will, by acceptance of legacies therein bequeathed to her.

3d. That, in point of fact, the whole estate was acquired before marriage, and there is no community property.

Upon the first hearing in this matter, this Court, in its rulings as to admissibility of evidence, held the alleged antenuptial contract invalid, by reason of defective execution, and also decided that under the rule laid down in *Estate of Silvey* (42 Cal., 210), only the separate and *one-half* of the community property were within the purview of the will.

This disposed of the first two grounds of opposition, and the case thereupon went to a referee, to ascertain and report the facts as to what property came to the hands of the executors; what, if any, remained for distribution; and what portion, if any, was community property.

The case now comes up for final adjudication, upon the report of the referee.

A motion is made on the part of the petitioner that this Court re-hear the testimony and modify the report of the referee, upon the ground of the insufficiency of the evidence to justify the referee's findings, and that the decision therein is contrary to law.

The specifications of error relate only to conclusions of law contained in the referee's report, and the motion must be denied.

The reference was merely to report certain facts, and not to try the whole issue.

Under C. C. P., Sec. 645, the finding reported has the effect of a special verdict, and so far as the report contains conclusions of law, it is merely advisory to the Court, which will draw its own conclusions of law from the facts found (C. C. P., Sec. 624). If the findings of fact are to be attacked, it must be hereafter by a motion for new trial.

The material facts, as reported, are as follows: Charles Patton died, December 25, 1873, being a resident of this

city and county. His will was duly admitted to probate in this Court, and letters testamentary issued thereon. The will is voluminous in its provisions, but so far as material here, their gist is that the estate is to be converted into cash by the executors, and after payment of sundry pecuniary legacies to the decedent's wife, children, and other relatives, the residue is to be invested on mortgage, and continue accumulating for a term of years; after which, and payment of small, further legacies, it is ultimately to be divided into two equal parts, one going to his children by the petitioner (of whom one only now survives), and the other going to the children of decedent's sister.

The marriage of decedent with the petitioner occurred at Philadelphia, Pa., February 25, 1863. He was then a resident of California, and immediately afterward brought his wife to this State, where they thenceforth resided. At the time of the marriage he was free from debt, and owned good promissory notes, etc., afterwards realized, to the amount of \$7,294.83.

His only other property of any value was a lot of land at Petaluma, known as lot No. 114, and an undivided interest in a tract of land upon Bernal Heights, in this city, acquired by deed of June 12, 1860, to himself and one Tarlton Caldwell.

Subsequently to the marriage, an amicable partition was had, by which Charles Patton's portion was set off to him in severalty. This land came to the possession of the executors.

At the time of the marriage, the tract was wholly unimproved, but afterward, Patton expended thereon, for building and fencing, about \$1,000, out of the community property, and he and his family resided thereon at the time of his death.

There was no evidence as to the value of the property at the time of the marriage, except the consideration of \$8,000 expressed in the deed of June 12, 1860. At the time of Patton's death, the value had greatly increased, but such increase (beyond the \$1,000 expended in improvements, as aforesaid,) was wholly owing to the extension of the city in

its direction, and the increased facilities in reaching the business part of the city therefrom.

A small portion of this tract was set apart to the family as a homestead by order of this Court. The remainder was, at the time of decedent's death, under a contract of sale on which he had received \$10,000. Conveyance was made by the executors pursuant to the contract, and the balance of \$80,359 was received by them in cash and notes secured by mortgage.

After his marriage, decedent was engaged in various kinds of business in this State, farming, operating in real estate and in mining stocks, and acting as agent for others. He also collected and invested with his own moneys, certain moneys of his wife, for which, with interest, she has claimed and received payment from the executors. He did not keep separately the funds received by him from different sources, but intermingled and deposited, paid out, loaned or invested the same indiscriminately.

The referee has ascertained, however, that he kept invested in his business, up to the time of his death, the cash collected on promissory notes, etc., owned before marriage, and on account of sale of the Bernal Heights property—making a total of \$17,294.83, to which the \$1,000 before alluded to as expended on the separate property is a partial offset—leaving a balance of \$16,294.83.

There is no finding of any income or profit from such investments. At decedent's death, in addition to the ante-nuptial real estate above mentioned, he was possessed of other real estate on the Potrero Nuevo in this city and county, and at Petaluma, and of personal property consisting principally of promissory notes, mining stocks, etc., on which about \$32,000 were realized by his executors. The only ante-nuptial property traced into this by the referee is the \$16,294.83 above alluded to.

Most of the estate has been converted into cash by the executors, and the surplus funds in their hands have been put out on interest, so that the total estate received by them, with its accumulations, has amounted to about \$150,000.

All of decedent's debts were contracted after the marriage and (except the claims of his wife for conversion of her moneys), were for general or family expenses. These debts have been paid by the executors, and they have made other proper disbursements to a large amount, in due course of administration.

These may be classified as follows: Pecuniary legacies bequeathed by the will, family allowance, funeral expenses, burial lot, monument to deceased (\$775), expenses incurred in the preservation, care, and management of specific pieces of property (inclusive of taxes on the same), commissions of executors, and general expenses of administration, such as fees of attorney for executors, court fees, etc.

Upon this state of facts the referee has treated as separate property the proceeds of sale received by the executors from the Bernal Heights tract and Lot 114, Petaluma, with the rents accrued prior to sale and the interest derived by the executors on such portions of said proceeds as they have loaned; also the sum of \$16,294.83 above mentioned. The remainder of the estate, he has treated as community property.

With this division neither party is fully satisfied.

On the part of the petitioner, it is urged that the appreciation in the value of the Bernal Heights' property since the marriage (it having been purchased for \$4,000 and sold for upward of \$90,000) belongs to the community estate.

The Court is of opinion, that if the impress of separate estate is once fixed upon property, that impress remains, and determines its character, where, as in this case, the enhanced value is caused by the growth of a city and by the surroundings, no act of the party having of itself contributed to the enhancement. Hence it follows that the Bernal Heights property was and its proceeds are the separate property of the deceased and subject to his testamentary disposition.

The other questions raised relate to the apportionment of the disbursements of the executors as between the community and the separate estates, and this Court is of opinion that the legal and proper apportionment is as follows:

Each estate is chargeable with executors' commissions on its gross amount, with proper average of the legal percentages; with all specific expenses incurred in its own preservation, care and management, and with its proportion, according to the gross amount of each estate respectively, of the *general* expenses of administration, so far as now paid or accrued.

The community estate is also chargeable with the payment of the debts of the deceased existing at the time of his death (including Mrs. Patton's claims for money converted), the expenses of his last sickness and funeral expenses, (including the burial lot, but exclusive of the monument,) and the amounts paid on family allowance.

The separate estate (or rather, the testamentary estate, which excludes only the widow's half of the community property,) is chargeable with all moneys paid or to be paid on account of the legacies or pursuant to other provisions of the will, and the expenses of the monument to the deceased.

The future expenses of administration will be a charge upon the estate to remain in the hands of the executors after this distribution, as the continuance of the administration will be for its benefit alone.

ESTATE OF MATTHEW CROOKS.

No. 9045—Nov. 5, 1879.

JURISDICTION TO CONSTRUE A WILL.—The Probate Court has jurisdiction to construe the language of a will so as to determine the proper persons or classes of persons to whom the estate shall be distributed and the character of the estate or interest such persons or classes of persons are to take therein, the decree of distribution being the charter by which they hold the property, and armed with which, they may apply to a general court of equity for aid or protection.

INTERPRETATION OF WORDS.—The words used in a bequest, "to those of the before mentioned children who have attained the age of twenty-one years," include only those children of such age at testator's death; and those under that age at the date of the death are excluded.

Construing sections, C. C., 1336-7-41; C. C. P., 1665-6.

W. Matthews, for executrix and widow.

M. C. Hassett, for Samuel.

Cope & Boyd, for Mrs. Peel.

The provisions of the will, bearing upon the points in controversy, are:

“I bequeath all my property * * to my wife, Susan Crooks, in trust for our children; namely: Margaret J. Peel, Matthew J., Annie, Susan, Samuel, California, Jackson, Jonathan, Robert L., and Ida O. Crooks, subject to the following conditions: That out of the income of the estate, my wife will pay all taxes, assessments, debts, and current expenses, maintain and educate our before-mentioned children; that she will pay, after my decease, the sum of five thousand dollars, in gold coin, to those of the before-mentioned children who have attained the age of twenty-one years. It is my wish and desire that none of my property be sold or disposed of in any other way than by lease, until my youngest surviving child shall be twenty-one years of age.”

The wife is to have the management of the estate during her life, and upon her decease or disability, “a majority of the surviving heirs who have attained the age of twenty-one years,” are to carry out the trust. Upon the death of the wife, and after the youngest surviving child shall have attained the age of twenty-one years, the estate shall be divided among the surviving heirs, share and share alike, the children of a deceased child to take the share of such deceased child. The executors may sell a part of the unproductive estate, should it be desirable, before the final distribution, but none of the productive.

The will was made December 28, 1875; testator died February 24, 1879; and the will was probated March 26, 1879.

At the date of the will, three of the children, Margaret J., Matthew J., and Annie, were over twenty-one; Susan attained twenty-one before her father's death; Samuel became twenty-one, August 21, 1879; the other five are still below twenty-one; the youngest, Ida O., being nearly seven.

Annie died subsequently to testator's death, leaving a husband surviving. The daughter Susan is now Mrs. Gonzales.

At the date of the will, the property of testator was of the value of about \$800,000, yielding a monthly income of about \$5,000. The estate is now appraised at \$616,000, yielding a monthly income of about \$4,000. During the life of Mr. Crooks, he maintained the children, as well adults as minors. None have independent means of support, except Mrs. Gonzales, whose husband is wealthy.

Mrs. Crooks, executrix, files her petition, praying that the Court construe the will, and decree to which of said children the testator intended to give said legacies of five thousand dollars, and that she be directed to pay the said legacies of five thousand dollars to such of the said children as may be entitled thereto.

Mrs. Peel objects, that this Court has no jurisdiction to construe the will; that this Court should distribute the estate to Mrs. Crooks, in trust, as specified in the will; that a court of equity alone has jurisdiction to construe the will and ascertain the intention of the testator.

Samuel Crooks appeared, and argued that by a proper construction of the will, the testator intended that each of said children, whether adult or minor, should have five thousand dollars, leaving the residue to be managed as directed by the will. He also produced a stipulation of all the adult children that that sum should be paid to him.

By the COURT: By the law of this State, the Probate Court is a court created by the Constitution, and has jurisdiction over matters relating to the settlement of the estates of deceased persons; among other matters, "to distribute the residue of the estate * * among the persons who by law are entitled thereto." (Sec. 1665, C. C. P.) If a trust is attempted to be created, this Court must determine how far the attempt is successful, what is the trust, who is the trustee, and who are the beneficiaries, and distribute accordingly. The decree of distribution, founded upon the will, is the warrant or charter of the trustees, and by it, the objects and purposes of the trust are expressed. Its subsequent

enforcement is quite a different matter. (See estate of W. C. Hinckley, in this Volume, p. 189.)

It is therefore for this Court to determine whether each of said children is to have five thousand dollars, and if less than all, who are to take.

At the date of the will, three of the children were twenty-one; and another attained that age before testator's death. The remaining six were under twenty-one at his death.

The Civil Code provides as follows:

Sec. 1336. Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.

Sec. 1337. A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed.

The general principle of law is that there is a continuous publication of the will from the time of its execution to the death of the testator; which is in harmony with the Sec. 1336. The will provides that the trustee shall pay "after my decease," five thousand dollars "to those of the before mentioned children who have attained the age of twenty-one years." The words "those of" and "who have attained" are words of discrimination; they evidently refer to a class. It was urged on the argument that the testator intended that each child, from the eldest to the youngest, as he attained twenty-one years, should have the amount; but I cannot see that such a construction would be consistent with the words used. This is not a case of doubtful meaning or ambiguity; but the testator himself used words which in themselves imply a discrimination. Those who were to have the five thousand dollars were to have it "after my decease;" that is, as soon as it could be paid. There is no postponement of possession to a future period, as referred to in the foregoing sections.

It therefore follows that the children who were of the age of twenty-one years, at the death of testator, will be entitled to receive from the trustee the sum of five thousand dollars each, and that those who were then under that age will not be entitled thereto.

Let a decree of partial distribution be drawn, distributing to Mrs. Susan Crooks twenty thousand dollars in trust, to pay as follows:

To Margaret J. Peel, five thousand dollars; to Matthew J. Crooks, five thousand dollars; to the heirs of Annie, now deceased, (viz: one-half to her surviving husband and the other half in equal shares to her mother, brothers, and sisters,) five thousand dollars; and to Mrs. Susan Gonzalez, five thousand dollars.

As Mrs. Crooks has heretofore made advances to some of said children, the amounts of such advances will be deducted respectively.

ESTATE OF JOHN WALSH.

No. 8686—Nov. 24, 1879.

REVOCATION OF LETTERS OF ADMINISTRATION OF PUBLIC ADMINISTRATOR, GROUNDS:
Failure to file inventory, and to deposit funds in County Treasury as required by law.

Construing sections, C. C. P., 1729, 1737.

R. N. Steere and *E. W. Blaney*, for petitioner.

M. Cooney, for administrator.

Letters of administration were issued Nov. 11, 1878, to the then Public Administrator of this city and county. In March, 1879, he gave notice to creditors to present their claims within four months. He has never presented or filed any report, exhibit, or account of his administration of the estate; no inventory was filed until Nov. 19, 1879, and after these proceedings were instituted; prior to April, 1879, he received more than \$2,300 cash belonging to the estate; in July, 1879, he withdrew from the bank of the Hibernia Savings and Loan Society more than \$4,000, and deposited

the same, with the other moneys received by him, in bank, in his individual name, mingled with his own funds, and not in any way distinguished; the moneys were not needed to pay current expenses. He has never deposited any of the funds of the estate with the City and County Treasurer. At least \$4,000 should have been so deposited. In making his official semi-annual report as Public Administrator, to the Judge of this Court, it does not appear that up to June 30, 1879, he had received any property of said estate.

The Court therefore finds that the administrator has wrongfully neglected the estate, and has failed to perform acts as such administrator which are required by law to be performed, viz: rendering account and inventory, depositing money in the County Treasury, and making semi-annual statement of the affairs of said estate; and it is ordered that the letters of administration of said estate heretofore granted be revoked in accordance with the prayer of petitioner.

ESTATES OF JOHN AND JOHANNA CRONIN.

Nos. 4701 and 5128—Dec. 31, 1879.

DISTRIBUTION, WHERE HEIR OR DEVISEE DIES PENDING ADMINISTRATION; AND THE ESTATE OF SUCH HEIR OR DEVISEE IS UNSETTLED AT THE TIME OF DISTRIBUTION.—
 An executor or administrator is not a proper person to receive title and transmit the same. His duty and connection with estate lies simply in its administration for the payment of the debts. He cannot, therefore, properly be made a distributee of another estate. The true course should be to administer the estate of the heir or devisee, and distribute the interest which such decedent may have in the former estate to the proper parties, who may, when thus armed with their decree, apply for the share to which they may thereby be entitled in the estate of the first decedent as representing an heir or devisee thereof.

Construing sections, C. C. P., 1665-6-7.

WILL.—DISTRIBUTION.—SURVIVOR.—DEVISE to two beneficiaries and to the survivor in case either died before distribution.

Testatrix devised all her estate to her two daughters, share and share alike, with the provision that in case of the death of either before distribution, the survivor should take the whole estate. One daughter made a conveyance of her estate to a stranger and died before distribution.

HELD, that the surviving daughter took the entire estate to the exclusion of grantee of deceased daughter.

Construing section, C. C., 1345.

W. A. Plunkett, for executors of both estates.

J. M. Burnett, for devisees of Johanna Cronin.

John Cronin died testate April 1, 1872, seized of real estate, and administration is now pending. A portion of the estate was devised to his wife, Johanna Cronin, who has since died testate, and administration of her estate is also pending. Both estates are ready for distribution. The direction of the Court is asked as to the proper mode of distribution; that is, whether the interest of the estate of Johanna Cronin in the estate of John Cronin, acquired by her through the will of her husband, should be distributed, in the distribution of the estate of John Cronin, to the executor of the will of Johanna Cronin, or to the devisees named in the will of Johanna Cronin.

By the COURT: It is not the province of an executor or administrator to take title on distribution; he administers upon the title of the testate or intestate, and the object of his administration is to pay the debts and ascertain who is entitled to the surplus. The proper course to pursue in these cases is, to close the estate of Johanna Cronin, by having distribution of her estate, including her interest in the estate of John Cronin, to her devisees, and then let those devisees go with the decree of distribution to the estate of John Cronin, and apply to have the interest of Johanna Cronin in the estate of John Cronin distributed to them as successors in interest of Johanna Cronin as found in the decree of distribution of her estate.*

The same principles would apply, as well to the estates of intestates as of testates.

* This course was pursued, and thus both estates were disposed of.

Wm. A. Plunkett, for Mary Cronin.

John M. Burnett and *C. F. McC. Delaney*, for Mary H. Daley, grantee of devisee.

John Cronin, by his will, devised and bequeathed all of his property, real and personal, to his wife, Johanna Cronin, for her sole use and benefit while she remained unmarried; but in the event of her marriage, the estate was to go to his wife, Johanna Cronin, and his daughters, Julia and Mary Cronin, equally—one-third to each; and in case of the death of either of said daughters, while his wife remained unmarried, the share of the daughter so dying was to be equally divided between his wife and the surviving daughter; but if the death of the daughter should occur after his wife's marriage, then the share of the daughter dying was to go to the surviving daughter.

Johanna Cronin died on the second day of October, A.D. 1872, leaving her surviving her two daughters, Julia and Mary Cronin. By her will, she devised and bequeathed all of her property to her two daughters, Julia and Mary Cronin, share and share alike. And in case of the death of either daughter before the distribution of the estate, the share of the daughter so dying was to go to the surviving daughter.

Julia Cronin died before the distribution of the estate. Previous to her death, to wit: on the twenty-second day of November, A.D. 1876, she made what was intended by her as a conveyance of all of her interest in the estate to one Mary L. Daly.

The surviving daughter, Mary Cronin, then made application for the distribution of the whole estate to her as the only person entitled to the same under the will. This application was contested by Mary Daly, grantee of deceased daughter, who claimed that she was entitled, under the conveyance above mentioned, to the share of said Julia Cronin, deceased.

By the COURT: The deceased daughter having died before distribution, the surviving daughter took all the estate of both John and Johanna, under the will, to the exclusion of the grantee of deceased daughter.

ESTATE OF GIOVANNI SBARBORO.

No. 8751—Nov. 18, 1879.

LEGITIMACY, CONCLUSIVE PRESUMPTION OF, FROM UNINTERRUPTED INTERCOURSE OF HUSBAND AND WIFE. ADOPTION: ACTS OF A PARAMOUR IN RECOGNITION OF HIS PATERNITY OF THE OFFSPRING OF AN ADULTEROUS WIFE.

A claim, as pretermitted heir, cannot be maintained against the estate of a testator, by a child, the offspring of an adulterous wife, who was cohabiting with her husband, on the ground that such unchaste wife was the mistress of the deceased, and that he, at times, made statements tending to admit that he was the child's father; but such child must be deemed legitimate offspring of the husband and wife.

Nor can such loose acts of recognition of child be deemed an adoption.

December 19, 1879.

LIMITATION OF ONE YEAR TO REVOKE PROBATE.—WHEN DOES IT EXPIRE?

A petition to revoke probate of a will admitted December 2, 1878, was, late in the evening of December 2, 1879, placed in the hands of the Judge with request for a citation. The Judge delivered it to the clerk the next day directing it to be filed as of December 2, 1879, and signed an order as of the date of filing December 2, 1879. The citation was not issued for several days.

HELD, that the paper was filed in time; and that it was not necessary that the citation should be actually issued within the year.

Construing sections, C. C., 193, 195, 230; C. C. P., 1327, 1333, 1962.

D. McClure and *G. E. Harpham*, for petitioner.

J. M. Burnett and *E. D. Sawyer*, for legatee.

Testator by his will gave all his property to his niece.

Petitioner claims to be his illegitimate child, adopted by him, and that she is entitled to have the entire estate, she not being referred to in the will.

Mr. and Mrs. Byrne, husband and wife, resided together during a year preceding the birth of petitioner. Both testified that she was the child of Mrs. Byrne, but not of Mr. Byrne; that they occupied the same bed, but that no more intimate personal relationship existed during the year. Mrs. Byrne testified that testator was the father of the child. Byrne admitted that he had been unchaste with other women, and that he was ailing therefrom. Several years thereafter, Byrne obtained a divorce, and has married again. Prior to the birth of petitioner, Sbarboro was a lodger in the house of Byrne, and had meretricious relations with Mrs. Byrne.

Those relations continued; after the divorce he paid the rent and most of the living expenses; had a room in the house; had frequent quarrels; removed to other quarters, and then returned. He told several persons that petitioner was his child; gave her money and presents, and petted her. She was generally known as Jenny Byrne.

By the COURT: Sections 193 and 195, C. C., provide that all children born in wedlock are presumed to be legitimate, and that illegitimacy may be proved like any other fact. Sec. 1962, C. C. P., provides that the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.

Cohabiting is defined by Bouvier to mean living together, occupying the same house. It does not necessarily include all acts that may occur between males and females; it is designed to include opportunity for access.

Byrne and his wife were cohabiting together for more than a year prior to the birth of petitioner. She is therefore indisputably presumed to be legitimate. She is, therefore, in law, not the illegitimate child of Sbarboro, and he could not have adopted her under Sec. 230, C. C. Even if she had been his illegitimate child, the facts of this case would not have shown an adoption by him. He acknowledged the child to be his, but he did not treat it as if it were legitimate. He lived in the house and had immoral relations with Mrs. Byrne both before and after the divorce, continued until the child had grown to womanhood, had married and gone away. The whole thing was immoral and indecent, gross to a degree. Men do not treat legitimate children in that manner.

Nonsuit is granted.

December 19, 1879.

A. D. Splivalo and *R. W. Hent*, for petitioners.

J. M. Burnett and *E. D. Sawyer*, for executor and residuary legatee.

The will of testator was admitted to probate December 2, 1878. Petitioners have filed a petition for the revocation of the probate of the will. The executor and residuary legatee move to correct the filing of the petition and that the petition be dismissed. The motion is based on the following facts:

The petition was presented to the Judge of this Court at his private residence in this city and county, on the second day of December, 1879, at the hour of between seven and eight o'clock in the evening, with the request that he would sign an order for a citation under Sec. 1328, C. C. P.; the person presenting the same stating that it was necessary to have the petition filed that evening, that being the last day of the year in which to have it filed. The Judge was not at the moment satisfied that the petition entitled the petitioners to the order, and was then otherwise engaged, and stated to the person presenting the petition if he would leave it with said Judge for examination he would examine it and himself place it in the office of the clerk of this Court the following morning, with the same effect as if then (Dec. 2, 1879,) placed there, and have it filed as of Dec. 2, 1879, and have the order made. Upon that statement the petition and draft order were left with the Judge, who, after examining the petition, signed the order. On the following morning, Dec. 3, 1879, at about nine o'clock, the said Judge placed the said petition and order in the hands of one of the deputy clerks of this Court, at the office of the clerk, and directed verbally that the same be filed as of Dec. 2, 1879. On Dec. 4, 1879, the same not having been marked as filed by the clerk, (the attorneys for the administrator and residuary legatee appearing and protesting against said marking,) the said Court made and entered an order that the clerk mark the said petition filed as of Dec. 2, 1879, and that he mark and enter the said order as of the same day. The citation was thereupon issued.

Points by administrator and legatee:

1. As the will was admitted to probate Dec. 2, 1878, the year mentioned in Sec. 1327, C. C. P., commenced to

run on that day, and expired with Dec. 1, 1879; the year was then fully completed; any other construction would give a year and a day. A petition for revocation could have been filed at any hour of Dec. 2, 1878, after the order admitting to probate; and is too late if not filed until Dec. 2, 1879.

13 B. Monroe, 461; 15 Mass., 193; 38 Cal., 407.

2. Sec. 1328, C. C. P., provides that "upon filing the petition, a citation must be issued," etc.; which means that the citation must immediately follow the filing of the petition. Two days elapsed before this citation was issued, which was not "upon filing the petition," and was too late.

3. According to Sec. 1327, the petitioner "must file in the Court" his petition. Leaving the petition with the Judge at his private residence is not filing in the Court. The Court had no power to direct the clerk to mark the paper filed as of a day previous to it being actually placed in the clerk's office.

Contra:

Sec. 12, C. C. P., is conclusive. It provides that "the time in which any act provided by law is to be done is computed by excluding the first day and including the last." Dec. 2, 1878, is therefore excluded in the computation and Dec. 2, 1879, included, which completes the year.

1 Metcalf, 127; 3 Denio, 12; 7 Marsh., (Ky.) 202; 4 N. H., 267; 46 Barb., 615; 11 Howard, 193; 8 Cal., 412; 1 Pick., 494.

By the COURT: 1. The object of Sec. 12 was to remove any doubt which might have existed as to when the time for doing an act commences to run, and applied to this case, clearly declares that Dec. 2, 1878, is to be excluded; therefore the year commenced to run at midnight Dec. 2-3, 1878, and expired midnight Dec. 2-3, 1879, and the petition was in time.

2. After the petition has been filed, a citation can be issued within a reasonable time; the statute does not mean forthwith.

3. In this case, the petition was presented to the Judge within the time. It was necessary for him to examine it, to ascertain if the party was entitled to the citation. The party had done all that he could do, when he had asked to have the aid of the Court. The officers of the law have a reasonable time in which to determine what course to pursue, and the time so taken cannot work an injury to the parties.

Motion to dismiss is denied.

ESTATE OF MARGARET T. CLARKE.

No. 8977—Dec. 29, 1879.

REVOCATION OF PROBATE. — PETITION FOR. — DEMURRER TO SUCH PETITION. — Where THERE IS ONE PROPER ALLEGATION IN A PETITION FOR REVOCATION, AS THAT THE TESTATRIX WAS NOT OF SOUND AND DISPOSING MIND at the date of execution of the supposed will, a general demurrer will be overruled, such allegation being an averment of a fact.

BUT IN ALLEGING RESTRAINT, UNDUE INFLUENCE, OR FRAUDULENT MISREPRESENTATION, THE FACTS constituting the restraint, undue influence, or fraudulent misrepresentation, must be set forth in the pleading.

THE PERSONS WHO EXERCISED THE IMPROPER RESTRAINT OR INFLUENCE OR MADE THE MISREPRESENTATIONS NEED NOT BE ACTUALLY DESIGNATED in the petition, inasmuch as they may be unknown to petitioner, who may still be aware that the will was a nullity by reason of such circumstances and conduct.

Construing sections, C. C. P., 1312, 1317, 1327, 1329.

W. H. L. Barnes, for petitioner.

Wm. Barber and *P. G. Galpin*, for executors.

The will of deceased having been theretofore admitted to probate, a petition was filed for its revocation, as follows:

Your petitioner, Daniel Wallace, respectfully shows to this Court:

That said Margaret T. Clarke died intestate in the town of Michelstown, County of Cork, Ireland, on or about the 28th day of December, 1878, and was at the time of her death a resident of the City and County of San Francisco.

That on or about the 28th day of January, 1879, a document was filed in this Court by Messrs. John T. Doyle and John H. Redington, of the said City of San Francisco, with

a petition claiming that said document was the last will and testament of said Margaret T. Clarke, deceased, and asking that the same be admitted to probate as such, and that said John T. Doyle and John H. Redington be appointed executors.

That upon said petition, after proceedings had in this Court, an order was duly made and entered on the 21st day of April, 1879, admitting said supposed will to probate as the last will and testament of said deceased, and appointing the said John T. Doyle and John H. Redington as executors thereof; and thereupon the said John T. Doyle and John H. Redington duly qualified and received letters testamentary from this Court, and are now in the possession of and administering upon the estate of said deceased, as executors.

Your petitioner further shows that he is a brother of said deceased, and is upwards of twenty-one years of age; that he is a legatee under said supposed will in the sum of five thousand dollars; that the deceased left no husband, and no children; that since the death of said deceased, the father of your petitioner, who was also the father of said deceased, has died, and that your petitioner is interested in his estate, as one of the heirs thereof.

That the names of the parties who are named as legatees or devisees, in said supposed will, and who have any interest in said estate, are as follows, viz:

John Wallace, father of deceased, of Rock Mills, County of Cork, Ireland, since deceased;

Mary O'Brien Wallace, of the same place, mother of deceased;

Daniel Wallace, of San Francisco, brother of deceased;

Richard Wallace, County of Cork, Ireland, brother of deceased;

Mary Little, City of Brooklyn, State of New York, sister of deceased;

Kate J. Powell, County of Cork, Ireland, sister of deceased; Joseph Sedgwick, East Portland, Oregon, nephew of deceased; Rev. Father Dempsey, San Mateo; Rev. William Bowman, San Mateo; Ellen Moloney, Menlo Park, Cal.; Mary Lawson, San Francisco; John T. Doyle and John H.

Redington, executors of the alleged will of Margaret T. Clarke, deceased;

John T. Doyle and John H. Redington, trustees of Kate J. Powell, of Michelstown, County of Cork, Ireland;

John T. Doyle and John H. Redington, trustees of Joseph Sedgwick, a minor nephew of deceased;

John T. Doyle and John H. Redington, trustees of Daniel Wallace, of San Francisco;

Joseph S. Alemany, Archbishop of San Francisco.

That all of the above named are of the age of twenty-one years, and upwards, with the exception of Joseph Sedgwick, whose last known place of residence, was East Portland, Oregon.

That all of the above named are residents of the State of California, except:

John Wallace, Mary O'Brien Wallace and Richard Wallace, who reside at Rock Mills, County of Cork, Ireland, and Kate J. Powell, who resides at Michelstown, County of Cork, Ireland; Mary Little, who resides in the City of Brooklyn, County of Kings, State of New York, and the said Joseph Sedgwick, hereinabove mentioned.

That all of the estate left by said deceased, is situated in the City and County of San Francisco, and was appraised at the sum of one hundred and twenty-three thousand, seventy-seven $\frac{88}{100}$ dollars (123,077. $\frac{88}{100}$), as follows viz:

[Stating the same.]

That the following are the grounds on which your petitioner asks that the probate of said alleged will be revoked:

First—That the said supposed will, so probated, as aforesaid, is not the last will and testament of said Margaret T. Clarke, deceased.

Second—That long prior to, and at the time of the signing of said supposed will by her, the said Margaret T. Clarke, deceased, she, the said Margaret T. Clarke, was not of sound and disposing mind, but was *non compos mentis*.

Third—That at the time of the signing of said supposed will, if the same ever was signed by her, the said Margaret

T. Clarke, deceased, she, the said Margaret T. Clarke, signed the same under restraint, undue influence and fraudulent misrepresentations.

Wherefore, your petitioner prays, etc.

Verified.

The executors filed demurrer and answer.

The demurrer is as follows:

John T. Doyle and John H. Redington, executors of the last will and testament of Margaret T. Clarke, deceased, demur to the petition filed herein by Daniel Wallace, and allege as grounds of demurrer:

1. That said petition does not state facts sufficient to constitute any cause of action, or to show that petitioner is entitled to file the same.

2. That said petition is uncertain in this:

That it does not set forth the nature of the restraint under which said will is asserted to have been signed, nor by whom the same was imposed.

3. That it does not set forth the nature of the undue influence alleged to have been exercised over the said Margaret T. Clarke, nor by whom the same was exercised.

4. That it does not set forth the nature or character of the alleged fraudulent representations, under which the said will is alleged to have been signed, nor what the said fraudulent representations actually were, nor in what respect they were fraudulent, nor by whom they were made.

By the COURT: (Nov. 26, 1879.) The demurrer is overruled as to point No. 1, for the reason that the demurrer is general; not directed to any particular part of the petition. There is at least one proper allegation in the petition, viz: that at the time of signing the supposed will, said Margaret T. Clarke was not of sound and disposing mind. An allegation of unsound mind is a proper averment of a fact. Where there is one proper allegation, a general demurrer will be overruled.

As to points Nos. 2, 3 and 4, the demurrer is sustained.

In alleging either restraint, undue influence, or fraudulent representations, the facts which are the basis of the allegation must be stated. Influence in executing a will is one thing, and may be quite proper; *undue* influence is another thing, quite improper. The facts constituting the supposed undue influence must be stated, so that the Court may determine whether the facts being found by the jury, as a matter of the law they constitute undue influence. So, as to restraint, and as to fraudulent representations. Representations may be quite commendable, while fraudulent representations would be reprehensible; whether the representations are fraudulent, or not, is a question of law, for the Court to determine.

Dec. 6, 1879, petitioner filed an amended petition, stating the facts regarding the proceedings for probate, and the heirs and devisees, and legatees, as is the former petition, and then as follows:

That the following are the grounds on which your petitioner asks that the probate of said alleged will be revoked:

First—That the said supposed will, so probated as aforesaid, is not the last will and testament of said Margaret T. Clarke, deceased.

Second—That long prior to, and at the time of the signing of said supposed will, by her, the said Margaret T. Clarke, deceased, she, the said Margaret T. Clarke, was not of sound and disposing mind, but was *non compos mentis*.

Third—That at the time of the signing of said supposed will, if the same ever was signed by her, the said Margaret T. Clarke, deceased, she, the said Margaret T. Clarke, signed the same under restraint, undue influence, and fraudulent misrepresentations.

That the restraint aforesaid, was of a moral nature, exerted by stronger wills over a weaker one, and that said restraint was so exerted by the aforesaid John T. Doyle, John H. Redington, Joseph S. Alemany, Rev. Father Bowman, Rev. Father Dempsey, and divers other persons, unknown to your petitioner.

That the nature of the undue influence aforesaid, was such as to overpower the enfeebled and tottering intellect of the said deceased, to divert her affections from their natural and proper channel, and to prevent her from pursuing the course, in the disposition of her property, which she would have done, had such undue influence not been exercised, and particularly in the case of your petitioner, and that said undue influence was exerted upon her, the said deceased, by the aforesaid John T. Doyle, John H. Redington, J. S. Alemany, Rev. Father Bowman, Rev. Father Dempsey, and by divers other persons, unknown to your petitioner.

That the nature of the fraudulent representations, aforesaid, was such as wrongfully to prejudice said deceased against your petitioner, and to cause her to withdraw from him her usual and habitual affection, and to violate and disregard her promises and agreements, previously made and entered into with your petitioner, and on his behalf; to instil into her mind false notions of her relative obligations to your petitioner, and other members of her family, and to the Roman Catholic Church, and to pervert and to distort her views of duty, and of religious obligation, and to induce her to trust the bulk of her estate, without security, to comparative strangers; instead of following the natural and proper course in its disposition, which she would have done had such fraudulent representations not been made. That said fraudulent representations were made by the said John T. Doyle, John H. Redington, Joseph S. Alemany, Rev. Father Dempsey, Rev. Father Bowman, and by divers other persons, unknown to your petitioner.

Prayer and Verification.

The executors filed demurrer and answer to the amended petition; the demurrer is as follows:

John T. Doyle and John H. Redington, executors of the last will and testament of Margaret T. Clarke, deceased, demur to the amended petition of Daniel Wallace, filed herein, for the following reasons:

1. That said petition does not state facts sufficient to constitute a cause of action, or to justify the relief prayed in said petition.

2. That the same is uncertain in this: that the allegations contained in said petition, in respect to the alleged restraint, under which the said will was signed, are vague, indefinite and uncertain.

That the nature of the undue influence exercised over the said Margaret T. Clarke, is not set forth with sufficient certainty or precision.

That the nature of the fraudulent representations under which the said will was signed, is not set forth with sufficient certainty or precision.

That the persons by whom the said restraint was exerted, are not described with sufficient certainty.

That the persons who exerted the said undue influence, are not described with sufficient certainty.

That the persons who made the said fraudulent representations, are not described with sufficient certainty.

By the COURT: (Dec. 29, 1879.) The demurrer is overruled as to point No. 1, for the same reasons given in the ruling on the former demurrer, viz: there is at least one proper allegation in the complaint, to wit: of unsoundness of mind; and a general demurrer will be overruled if there is one proper allegation. As to point No. 2, the demurrer is sustained, except as to the statement that the persons by whom the restraint, undue influence and fraudulent representations were exercised and made, are not sufficiently described; as to those statements the demurrer is overruled. This petition states the *nature* of the restraint, undue influence and fraudulent representations, but does not state *facts* tending to show either. As to the allegation of persons, it may be very true that the *persons* doing certain acts were unknown to petitioner, and yet a petition be good, if the facts be properly alleged.

ESTATE OF ELIZABETH ADSIT.

No. 7011—Dec. 29, 1879.

WILL.—SUBSEQUENTLY DISCOVERED CODICIL.—LIMITATION TO PROBATE OF.—Unless contested within the year prescribed by statute, the probate of a will is absolute. The proposing of a codicil for *additional* probate is a contest; and such codicil should be offered within the year; or it is barred, save as to persons under disability.

Construing sections, C. C., 14, 1287; C. C. P., 1327, 1333, 1908.

D. B. Belknap and *R. W. Hent*, for petitioner.

T. A. O'Brien, for legatees.

May 8, 1876, the will of testatrix was admitted to probate. It consisted of three separate papers, one dated April 7, 1875, a codicil dated May 10, 1875, and a second codicil dated March 21, 1876. By the first paper there was devised to testatrix's son in law, S. A. Fisher, the undivided half of a lot on Kearny street, and also all her interest in all other real estate. The first codicil provided that if she should survive Fisher the devise should go to his heirs. The second codicil read "Insert instead of Sidney A. Fisher, to my grand children, Lamon Sidney Fisher and Philip Fisher, the undivided of my said Kearny street property, and also the interest of any other real estate."

Nov. 6, 1879, a paper was filed, which was dated March 22, 1876, which reads: "I want my son in law, Sidney A. Fisher, to have one-half my Kearny street property. I would like this done before anything is settled. He will be out of bankruptcy then. This is my last wish, will and codicil. Elizabeth Adsit. I mean instead of my grandchild children. E. A."

Nov. 24, 1879, said S. A. Fisher filed a petition that said instrument be admitted to probate as a codicil to and a portion of the will of deceased.

The grandchildren, by attorney, filed opposition thereto, on the grounds that more than one year had elapsed since the probate of the will and before the filing of the paper of

March 22, 1876, and that the same is barred by Secs. 1327 and 1333, C. C. P.

To this opposition Fisher demurred.

MR. HENT: A subsequently executed will may be probated, after the order admitting the prior will. The paper now offered is a codicil, and may be admitted as such. We do not *contest* the will; we seek to have the codicil established as a *part of* the will, affirming the former will in all respects except as it is modified by this. The estate has not been distributed, but still remains under the jurisdiction and control of this Court.

3 Redf. on Wills, 51; 12 Allen, 1; 10 Grat., 358; 5 R. I., 112.

MR. O'BRIEN: The judgment of this Court of May 8, 1876, is conclusive upon the petitioner, he not laboring under disability.

Secs. 1327, 1333, C. C. P.; 26 Alabama, 524; 20 Cal., 270; 3 Howard, (Miss.) 157; 20 Vermont, 65; 29 Alabama, 95; 53 Penn. St. Rep., 382.

By the COURT: Sec. 1327 gives any person interested the right at any time within one year after the probate of a will to contest the probate or the validity of the will; and according to Sec. 1333, "if no person within one year after the probate of a will contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind, etc."

It is not apparent how language can be used plainer than this. "The probate of the will is *conclusive*;" that is, conclusive that the script offered and its contents constitute *the will* of deceased. The offering of a codicil is a contest, at least *pro tanto*. If its provisions are not antagonistic it is nothing; if they are antagonistic, in any respect, it is, so far, a contest. This alleged codicil proposes to divest the grandchildren of rights which the will, under the decree of May 8th, 1876, vested in them. It certainly offers a contest.

It is not necessary for us, nor is it profitable, in this regard, to resort to decisions of ecclesiastical courts, or of courts of other states under other systems. We have no such thing as admitting a will to probate "in common form;" under our statute all wills admitted are admitted under solemn form, after notice to all parties. When a paper is proposed, and notice given as required, the world has notice that the paper offered is proposed as and is said to express the last will and testament of the deceased; if any person has objection, or has another paper to offer, he may come forward. The legislature, in its care and wisdom, has provided, however, that another year shall be given, so that ample time may be had; if, at the expiration of that year, no voice has been raised, the will of the deceased is established—fixed; the probate is conclusive.

I am not here considering the power of the Court to revoke the order or reconsider it for fraud or imposition; the consideration of that power would rest upon entirely different grounds.

The demurrer is overruled.

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Will. Mental incapacity arising from alcoholism. Opinions of Experts. Instructions to Jury. O'Keefe, E. of, 154.

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Assignment of Share of Estate.

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Will. At the time of executing a will, there must be some form of request on the part of the testator to enable the witnesses to properly attest the will, though such request need not be in words. Fusilier, John, E. of, 40.

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Against deceased Executor's Estate. Held, to be absolute at his death.

The claim in such case must state, not only, that there are unsettled accounts of executor with the estate; but it must further show that there is a balance due from him, as executor; otherwise, distribution of his estate will not be delayed. *Halleck, Henry W., E. of, 46.*

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HELD, that the administratrix is entitled to credit in her account for payment of interest at statutory rate; and that interest in excess of such rate must be disallowed, although the mortgage creditor might have recovered compound interest in foreclosure in District Court. Titcomb, A. H., E. of, 55.

Interest on. When allowable. The allowance of a claim by administrator and Probate Judge is not such a proceeding as to make the claim rank as a judgment of the Court, and so, become interest bearing. The claim is not a judgment until it has passed through account and settlement and has been ordered paid.

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Presentation of. In action pending. The action was pending, and verdict had in decedent's lifetime; but no judgment entered until after his death, when the executors were substituted; appeal had; and final judgment to be paid in due course of administration, no claim having been presented.

HELD, that the objection should have been made in the District Court; that it comes too late after judgment. Page, Thomas S., E. of, 61.

Res adjudicata. Allowance. Facts, showing that there had been no absolute adjudication upon a claim, which had not been approved by the Probate Judge at the date of the settlement of the first annual account, in which it was mentioned; and that action on it had been reserved at the subsequent hearing of petition for sale of real estate; the heirs, therefore, having a right to petition to be allowed to contest it. Whitmore, H. M., E. of, 103.

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E. of Tittel, p. 97.

Conflicting Sections of Codes.

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Codicil.

Subsequently Discovered. Must be offered for probate within one year from date of probate of original will in like manner as if it were a revocation of such will, the proposing for probate of such codicil being in the nature of a contest of the original will. *Adsit, Elizabeth, E. of, 266.*

Commissions.

Extra Allowance. Administrator is entitled to extra allowance of commissions, when the administration has been particularly laborious. *Beideman, J. C., E. of, 66.*

Homestead. Executor cannot tax commissions on the homestead property. *Reck, Henry, E. of, 59.*

Net Proceeds. In case of property undergoing partition in District Court, the administrator is to be allowed commissions, only on the net proceeds of partition sale coming to the estate. *Marvin, C. B., E. of, 163.*

Successive Administrations. In the case of successive administrations, full commissions are not allowable until final closing. *Marvin, C. B., E. of, 163.*

Community Property.

Community Funds. Expended upon the separate estate of either husband or wife do not make it common property, but any enhanced value from local causes accrues to the separate estate so improved; such expended funds, however, may be treated as a charge upon the separate estate in favor of community. *Patton, Charles, E. of, 241.*

Insurance Policy. Where premiums were paid by the husband out of his earnings, partly before, and, partly after his marriage, the proceeds of the policy must be deemed, part separate, and part community property in a ratio with premiums paid. *Webb, M. S., E. of, 93.*

Insurance Policy. Bequest by husband to wife must be satisfied out of husband's half.

An insurance policy, the premiums on which, were paid out of husband's earnings, is community property. A bequest of the interest on \$4,000 to wife until she re-marries, is a claim on the husband's separate estate, to be calculated from his death to the re-marriage. *Stans, John H., E. of, 5.*

Community Property.

Partial Distribution. The widow is entitled to apply for her share of community property to be set over to her, though her title is that of *survivor*. In that connection, heir includes widow as survivor. Ricaud, J. P., E. of, 158.

Partnership, Man and woman living together as husband and wife, such status being impossible, he having an undivorced wife.

HELD, that such relations could not constitute a partnership and that the *real* wife was entitled to one-half community property. Winters, J. W., E. of, 131.

Widow's share in Estate. She takes as Survivor, not as Heir. "My estate," in husband's will, means estate subject to his testamentary disposition. A renunciation of "all claim to my estate, except under this will," is not a renunciation of widow's share of community property. Mumford, George H., E. of, 133.

See Husband and Wife.

Confirmation of Sale.

Under a Devise. A sale made under a devise in trust to executors, with power of sale, does not require confirmation by the Probate Court. The grantee under such sale may apply to the Court for distribution directly to himself. Delany, Matthew, E. of, 9.

Constitution.

State of California. (Old) Article XI, Section 16; (new) Article XX, Section 9. As to Perpetuities. Hinckley, E. of, 189.

Construction, Statutory.

See Codes: Statutes: Statutes, U. S., at large.

Contempt.

Finding of. Judgment of imprisonment of executor until he makes payment of the distributed shares of the estate. Taylor, R. D., E. of, 160.

Contest.

See Administration: Grant of Letters: Probate: Wills.

Contract.

Brokerage. An executor cannot contract with a broker to pay him all he may obtain for a piece of property of the estate, above a given amount, notwithstanding such amount may be a fair price for the property. Ballentine, James, E. of, 86.

Distribution Foreign law, unless made part of a contract affecting succession, must be disregarded in determining rights of inheritance. Baubichon, J. B., E. of, 55.

Guardian and Ward. An offer by a proposed guardian upon a contest for letters that he will, if appointed, maintain and educate the ward, is binding upon the guardian; and items in his account for maintenance of ward should be disallowed. Barg, John C., E. of, 69.

Contract.

Lawful. A contract between husband and wife affecting final disposition of their property, lawful. Patton, Charles, E. of, 241.

Lawful. Contract to cut timber on Public Lands, the title to which was in litigation.

HELD, to be a valid contract; and claim thereunder, allowable.

CONTRACT INTERPRETED. Whitmore, H. M., E. of, 103.

Cost Bill.

Filing. A cost bill should be filed as in civil cases for costs paid to persons other than officers of the Court upon an application to set aside a homestead. Ricaud, J. P., E. of, 158.

Costs.

Homestead. On setting aside a homestead, appraisers, reporter, and interpreter should be paid out of the estate. Ricaud, J. P., E. of, 158.

Counsel Fee.

See Attorney's Fee.

Coverture.

Disability. Coverture is no bar to the prescription of one year after probate, wherein to apply for revocation of probate. Broderick, David C., E. of, 19.

See Husband and Wife.

Creditors.

Decree of Distribution. Creditors, both resident and non-resident, are barred by decree of distribution. Dall, William L., E. of, 159.

Witness. A creditor can testify as to the fact of decedent's indebtedness to him on hearing of application for letters. Welch, John, E. of, 202.

See Claim.

Custody of Funds of Estate.

Administrator entitled to custody of funds of estate: May deposit them in bank to his credit. Not chargeable with interest, unless it appears that he has used them for his own benefit. Beideman, J. C., E. of, 66.

Loaning Funds. Administrator liable if he parts with custody of funds for purposes other than their security. Lacoste, Jean, E. of, 67.

See Administration: Administrator.

Custody of Person of Minor.

Direction as to custody of person of minor may be inserted in the order appointing father, guardian of minor.

An unsettled life and harsh disposition indicated as grounds for judicially restricting the father's custody of minor child. Linden, Irma, E. of, 215.

Custody of Person of Minor.

Divorce. The father not being shown to be competent, and no objection being urged against the mother, the guardianship of girls, minor children of divorced parents, was given to the mother. *Austerhau dt, minors, G. of, 18.*

See Guardianship.

Death.

Presumption as to. Enquiries made at a place, from whence supposed deceased person was known to have emigrated;

HELD, not to be material evidence. *Garrity, Owen, E. of, 180.*

Death before Distribution.

Distribution. Where the devisee or heir has died pending administration, the estate of such decedent should first be administered and distributed, and the parties entitled under such decree of distribution may then apply for distribution to them of the share in the estate of the former decedent to which such deceased heir or devisee would have been entitled. *Cronin, John and Johanna, E. of, 252.*

Will. Devise to two beneficiaries and to the survivor in case either dies before distribution.

HELD, that survivor takes estate to exclusion of grantee of deceased beneficiary. *Cronin, John and Johanna, E. of, 252.*

Debts: See Claim.

Deceased Executor.

Claim against his Estate must show, not only that there are unsettled accounts between him and his trust; but, also, that there is a balance due from him; or distribution will not be delayed. *Halleck, Henry W., E. of, 46.*

Decree.

Recitals in. Such recitals showing that jurisdictional notice has been given, (where affidavits on file are defective but not antagonistic), can be attacked only by a showing that they are, in point of fact, untrue; and further, that the Court has been imposed upon. *Rice, John D., E. of, 183.*

Defective Notice.

Proceedings to be Vacated. On attention being drawn to the fact that a notice of probate is defective, the Court, of its own motion, should vacate subsequent proceedings. *Cameto, Mercedes, E. of, 75.*

Delay in Administration.

Unreasonable Delay in Closing Estate. Where administrator, after having collected funds of the estate, which can be distributed, for no good reason, delays filing his account and closing the estate, he may be held chargeable with interest. *Seligman, Louis, E. of, 8.*

Delusion.

Will. Charge to Jury. *Tittel, Frederica A., E. of, 12.*

Demonstrative Legacy.

Funds to be kept intact. Where a special fund has been set apart by will to pay demonstrative legacies, the Court will not endanger the means of payment, by directing the payment out of such fund, of a legacy that may, ultimately, be satisfied from another source. Radovich, Luco, E. of, 118.

Devise.

Charitable or Benevolent Society. The Boys' Roman Catholic Orphan Asylum is a charitable and benevolent society; and, as such, entitled to take a bequest. Tobin, Richard, E. of, 134.

Conditional Devise. Executrix should pay taxes on property conditionally devised until condition has been complied with. Broad, Charles, E. of, 188.

Devise to Executors of Real Estate for Purposes of Sale. A sale under such devise does not require confirmation. Grantee can have distribution directly to himself. Delany, Matthew, E. of, 9.

Executorship. A devise made, whereby the only trust created in that of executorship, and the distribution postponed for a given period. Marvin, C. B., E. of, 168.

Future Contingent Interest vests in beneficiary, so as to be the subject of a succession. Selna, Ubaldo, E. of, 233.

Issue. To a person and "the issue of her body."

HELD, that, it not being the clear intention of the testator to create an absolute fee estate in such first devisee, such words were not synonymous with "heirs." McDonnell, John, E. of, 94.

Jurisdiction to Interpret. The Probate Court has jurisdiction to interpret a devise in trust; to pass upon its legality; to ascertain the parties entitled thereunder; and to distribute accordingly. Hinckley, William C., E. of, 189.

Meaning of Word. The word, *devise*, covers other estate than realty, notwithstanding its original, primary signification. Pfuels, Margaretha, E. of, 38.

Mortgage. Devise of property subject, at death of testator, to a mortgage bearing interest.

HELD, that, under Section 1513, C. C. P., devisee was entitled to have mortgage paid out of the estate. Phinney, Arthur, E. of, 239.

Perpetuity. A devise in trust, coupled with power to alienate, is not a perpetuity. Hinckley, William C., E. of, 189.

Precatory Language. "To wife's use and interest and those of children," with power of disposition.

HELD, that wife takes full property. Glass, Julius, E. of, 213.

Precatory Language. "To my beloved wife, the whole of my property, for her own use and benefit, and to maintain and support my said children with, the same to be hers absolutely."

HELD, to vest estate in wife, no trust being created thereby. Molk, John H., E. of, 212.

Devise.

Residue after Settlement of Estate. The beneficiaries entitled to residue under a devise to executors in trust, with power of sale, may, at their option, have such residue distributed to them in kind, or have a sale and division of proceeds. *Delany, Matthew, E. of, 9.*

Specific: Taxes and Assessments upon. Executor should, pending administration, pay taxes and assessments on property specifically devised; and collect from devisee, at distribution; or if need be, he may then have an order of sale of the property to enable him to reimburse himself. *Mogan, A., E. of, 80.*

Survivorship. Will. Devise to two beneficiaries and to the survivor, in case either dies before distribution.

HELD, that survivor takes estate to the exclusion of grantee of deceased beneficiary. *Cronin, John and Johanna, E. of, 252.*

Uncertainty in. Charitable Devise. There is no uncertainty in a devise, the mode of execution of which, is left to the "wisdom, faithfulness, and discretion" of the trustees; and the object of which is the "advancement of the cause of beneficence and charity." *Hinckley Wm. C., E. of, 189.*

See Will.

Disability.

Coverture not a disability which would permit a woman to apply for revocation of probate after one year. *Broderick, David C., E. of, 19.*

Discovery.

Witness. Section 1459, C. C. P., held to apply only to transactions between witness and decedent in the lifetime of the latter. *Imhaus, Louis, E. of, 99.*

Distribution.

Assignee of deceased Heir is entitled to have assigned property distributed directly to him in satisfaction of his claim.

The Court cannot, however, distribute property to the holder of an assignment coupled with a defeasance; as that would be in the nature of a mortgage rather than a divesting of the legal title. *Hite, Ormsby, E. of, 232.*

Assignee of one of two devisees under a devise providing that in the event of the death of either devisee before distribution the survivor should take, is not entitled to anything at the distribution, the assignor having died. *Cronin, John and Johanna, E. of, 252.*

Bequest to an extinct Organization. A similar association, organized subsequently to the vesting of the legacy by the death of testator, cannot take a bequest conditioned, that if a certain organization has ceased to exist at the death of testator, the fund should be otherwise appropriated, it appearing that such original organization had ceased to exist before testator's death. *Neil, Thomas, E. of, 79.*

Claim against Estate of deceased executor must show that there are unsettled accounts between him and his trust, and also that there is a balance due from him, or distribution of his estate will not be delayed. *Halleck, H. W., E. of, 46.*

Distribution.

Creditors. A decree of distribution is conclusive on creditors, resident and non-resident. *Dall, William L., E. of, 159.*

Death of Devisee or Heir pending Administration. In such case, it is not proper to distribute the share of the deceased to his executor. An executor or administrator is not a proper channel for the transmission of title. The true course would be to settle and distribute the estate of the proposed deceased distributee, and armed with the decree, to apply for the share of such heir or devisee in the estate of the first decedent. *Cronin, John and Johanna, E. of, 252.*

Delayed by Terms of Will. A devise made whereby the only trust created is that of executorship, and the distribution is thereby delayed for an appointed time. *Marvin, C. B., E. of, 163.*

Demonstrative Legacy. Where a special fund has been set apart by will to pay demonstrative legacies, the Court will not endanger the means of payment by directing the payment, out of such fund, of a legacy that may, ultimately, be satisfied from another source. *Radovich, Luco, E. of, 118.*

Executor cannot Retain a Lien after. Balance on settlement of account in favor of executor, should be paid before distribution. Executor can have no lien upon property after distribution, unless the parties, distributees, can and do consent thereto. *Sweigert, Adam, E. of, 152.*

Foreign Law. On distribution, foreign law, unless made part of a contract affecting succession, must be disregarded. *Baubichon, J. B., E. of, 55.*

Homestead. Separate Estate. An unimproved lot, which had never been used as a residence, having been set apart to the widow, as a homestead, there being only non-resident brothers and sisters, as heirs, the other heirs applied to the Court to have the widow, as administratrix, include such real estate in her accounts; and to have the same distributed, claiming that the homestead order was a nullity; and that the property was separate estate. Application denied. *Burns, Bernard, E. of, 155.*

Inventory and Appraisement. The account of an administrator cannot be settled, until there has been an appraisement of the property in inventory on file. *Selna, Ubaldo, E. of, 233.*

Lapsed Legacy. A stepson is not such a relation as would, under Sec. 1310, C. C., prevent a legacy from lapsing. *Pfuelh, Margaretha, E. of, 38.*

Marriage Contract. When a marriage contract has been properly executed, the Probate Court has the right to consider it in determining manner of distributing estate. A contract affecting final distribution of property of married persons, is lawful. *Patton, Charles, E. of, 241.*

Partial Distribution. Community Property. The widow is entitled to apply for her share of community property to be set over to her, although her title is that of survivor. In that connection, heir includes widow as survivor. *Ricaud, J. P., E. of, 158.*

Distribution.

Property Subject to a Mortgage. All parties acquiescing, the Probate Court may distribute property subject to mortgage; provided the mortgage creditor is willing to forego any recourse for his debt upon the remainder of estate. Hinckley, William C., E. of, 189.

Refusal to pay over. Judgment of imprisonment of executor for contempt, in failing to make payment of distributive shares upon distribution. Taylor, R. D., E. of, 160.

Title Distributed. What title the Probate Court deals with. When there is any color of title whatever in an estate, it is the duty of the Probate Court to distribute it. It cannot try the title as between an estate and a stranger. This is not in conflict with the duty of the Court to refrain from burthening its record with futile decrees of distribution when there is clearly no estate to distribute. Dunn, John, E. of, 122.

Will. Bequest to a religious corporation is void, under Section 1275, C. Code. Wright, Mary, E. of, 213.

Will. Pretermitted Child. An illegitimate child, who is not mentioned in her mother's will, inherits as pretermitted. Wardell, Ada, E. of, 224.

See Administration: Will.

Divorce.

Contest as to Guardianship of minor children of divorced parents. The mother appointed in preference to the father, as guardian of minor girls. Austerhandt, Minors, G. of, 18.

See Husband and Wife.

Domicile.

Intent. A statement of facts tending to show the intent of party, from which the Court determines which of two places of sojourn is the jurisdictional residence. Austin, Margaret, E. of, 237.

Intent. A statement of facts tending to show that a claim of residence was not made in good faith. Samuel, Michael J., E. of, 228.

See Residence.

Erasure in Will.

Cancellation of a single clause by erasure. Where the purpose of the testator to so cancel, is clear, the will should be proved without such clause. Chinmark, Moses, E. of, 128.

Escheat.

Alien Non-residents. By reason of being a non-resident alien, after ten years, a party claiming as heir, loses all right to ask for revocation of probate, any interest which such alien might theretofore have possessed in the estate, having escheated. Broderick, David C., E. of, 19.

Estoppel.

Account. Funds treated as a cash item. The administrator is estopped from afterwards showing that they were loaned out. *Lacoste, Jean, E. of, 67.*

Guardian and Ward. When on a contest for the guardianship, the person thereon appointed, as an inducement to the Court to prefer him, offered to maintain the minor at his own cost, which offer was embodied in the order of appointment, such guardian is bound by his offer; and any items in his accounts with ward for maintenance cannot be allowed. *Barg, John C., E. of, 69.*

Evidence.

Examination of Witness. Section 1459, C. C. P., held to apply only to matters occurring in lifetime of decedent. *Imhaus, Louis, E. of, 99.*

Husband and Wife. Wife cannot be questioned as to conversations between herself and husband upon any subject whatever. Such disability, as a witness, is not removed by death of husband. *Low, C. L., E. of, 143.*

Marriage. Meretricious cohabitation, with or without promise of future marriage, does not constitute marriage. *Beverson, Claus, E. of, 35.*

Marriage. Meretricious relations raise no presumption of marriage, even where parties, for temporary purposes, have held themselves out as husband and wife. *Howe, George L., E. of, 100.*

Presumption of death. Enquiries made at a place, from whence supposed deceased party was known to have emigrated, not material evidence. *Garity, Owen, E. of, 180.*

Presumption of Gift. There is no presumption that the wife intended to make a gift to him of her moneys in bank, arising by reason of her instruction to the bank to place her account in the joint names of herself and husband. Such action merely constitutes an authority to him to draw, revoked by her death. *Cunningham, Kate, E. of, 76.*

Privileged Communications. Husband and Wife. Neither party can be examined as to their conversations with each other, even after the death of the other. *Low, C. L., E. of, 143.*

Will. Proof Extrinsic to a Will may be introduced to show who is meant to be nominated as executor, when the testator has been inaccurate in designating him by his style as officer of one of the subordinate assemblies of a secret benevolent order; and, the person so shown to be intended, will be granted letters. *Colette, O. A. P., E. of, 116.*

Witness. On Grant of Letters. A creditor can testify as to the fact of the indebtedness of the decedent to him on hearing of application for letters. *Welch, John, E. of, 202.*

See Distribution: Will.

Executor.

Appointment of. When it can be fairly ascertained who is meant by testator in a testamentary nomination of executor, the fact that he has been inaccurate in styling the nominee, who was officer of a secret organization, will not be regarded. Colette, O. A. P., E. of, 116.

Attorney's Fee. Where attorney performs services which should properly devolve on executor, they should be paid for by executor out of executor's commissions. Ballentine, James, E. of, 86.

Attorney's Fee Disallowed, where it appears to have been incurred by executor in his own behalf in litigating a conflict with the estate. Stott, William, E. of, 168.

Balance in his favor Executor can have no lien for balance in his favor on settlement of account after distribution. Sweigert, Adam, E. of, 152.

Commissions. Homestead. Executor cannot tax commissions on homestead property. Reck, Henry, E. of, 59.

Executor Garnisheed for share or interest of heir in the estate. Executor is not subject to garnishment for the share of an heir who has been sued for debt; nor can the heir's interest be reached in that manner before distribution. Sime, John, E. of, 100.

Grant of Letters. Incompetence of person named in the will to take letters by reason of his immoral character. A man "who lives by his wits," not a proper subject to be awarded executorship. Plaisance, Ida, E. of, 117.

Grounds for opening account, by minor who has come of age:

1. That executor made affidavit, as attorney in fact of claimant, to a claim; and, thereafter allowed and paid the claim.

2. That executor procured his individual claim to be allowed by his co-executor and approved by Judge, but not by the latter until time for presentation had expired. Keenan, John C., E. of, 186.

Interest. Annual rests. Executor chargeable with interest, to be compounded with annual rests, if he mingles the money of the estate with his own. Stott, William, E. of, 168.

Judgment of imprisonment of executor, for failing to make payment of the distributed share of the estate. Taylor, R. D., E. of, 160.

Non-resident. A non-resident executor has no standing in court which would entitle him to nominate an administrator. Murphy, Mary, E. of, 185.

See Administration.

Expenses of Administration.

Attorney's Fees, for services rendered for the estate at the instance of the executor, are payable out of its funds by an administrator, who succeeds to trust. Marvin, C. B., E. of, 163.

Common and Separate Estate. Expenses of administration are to be assessed proportionately upon common and separate property of decedent. Patton, Charles, E. of, 241.

See Administration.

Experts.

Will. Mental incapacity arising from alcoholism. Instruction to Jury. O'Keefe, E. of, 154.

Family Allowance.

Mortgage on Household Furniture. In setting apart property for the use of the family, this Court can take no notice of a chattel mortgage upon the furniture set apart. Whatever rights the mortgage creditor may have must be enforced elsewhere. Fleury, Jean, E. of, 227.

Widow. A wife separated from her husband under circumstances which would preclude her from the right, in her lifetime, to call on him for support, is not entitled to a widow's allowance, she being in no sense, a member of his family. Byrne, H. H., E. of, 1.

See Widow.

Federal Laws,

See Statutes U. S. at large.

Filing.

What is filing? Where a petition is handed to the Judge, it is to be deemed a filing, though it may not be placed in the Clerk's hands until afterwards. Sbarboro, Giovanni, E. of, 255.

Foreclosure.

Homestead. When the Probate Court sets aside a homestead, it thereafter loses jurisdiction over the property; and cannot order a sale of it to pay mortgage lien on the lot. The remedy must be by foreclosure. Rondel, E. F., E. of, 70.

Foreign Funds.

Guardian Account. Funds received by guardian from foreign jurisdiction are presumed to have been ordered transferred hither by foreign court, to be administered here, where ward and guardian reside; and should be accounted for here, unless there is a positive showing that guardian has actually accounted for them elsewhere. Secchi, Minors, E. and G. of, 225.

Foreign Law.

Distribution. Unless made part of a contract affecting succession, the foreign law is to be disregarded. Baubichon, J. B., E. of, 55.

Foreign Tribunal.

Presumption of transfer of funds. In case of funds received here by guardian from a foreign country, it will be presumed, without positive showing to the contrary, that they were ordered transferred by the foreign tribunal, to be administered at the common domicile of guardian and ward. Secchi, Minors, E. and G. of, 225.

Future Contingent Interest.

Devise. A future contingent interest vests in the beneficiary so as to be the subject of a succession. Selna, Ubaldo, E. of, 233.

Garnishment.

Executor served with Garnishment Process. The executor is not subject to garnishment process, for the share of the heir, who has been sued for a debt; nor can the heir's interest in the estate be reached by garnishment before distribution. Sime, John, E. of, 100.

Gift by Wife to Husband.

Bank Book. The fact that wife joined her husband's name to hers in her savings bank account, raises no presumption that she intended to give him the deposit. Such a transaction was merely an authority to him to draw, revoked by her death. Cunningham, Katie, E. of, 76.

Gift inter vivos.

Order for Sum of Money. Delivery of a deed for real estate and also an order to receive the consideration price held to be valid as a gift *inter vivos*, though the deed was not handed to the grantee, nor the money paid until after death of donor. Cronan, Thomas, E. of, 72.

Grant of Letters.

Executor. Incompetence of person named in will to take letters by reason of his immoral character. A man "who lives by his wits," not a proper subject to be awarded executorship. Plaisance, Ida, E. of, 117.

Guardianship. A guardian who, in a contest for letters, offers that, in the event of letters being issued to him, he will maintain and educate the ward, and such offer is embodied in the order for issuance of the letters, is bound thereby; and cannot, on settlement of his account, be credited with items of expense of maintenance. Barg, John C., E. of, 69.

Jurisdiction. Residence inferred from acts of decedent. His conflicting acts and assertions as to his intention. Where his election of residence was not sincere; but for a specious purpose, it must be disregarded. Samuel, Michael J., E. of, 228.

No Estate. Letters will not be issued, where it appears that the object of them, there being no actual estate, is to clothe some one with the trust for the purpose of making him defendant in an action to quiet title. Murray, F. X., E. of, 208.

Nominee of Grandmother. As against a creditor, under the law in force (March, 1875,) the Court has a discretionary right to appoint the nominee of the grandmother of an unmarried minor as administrator. Wyche, Mary, E. of, 85.

Nominee of Non-resident widow, entitled to letters over Public Administrator. Cotter, Henry B., E. of, 179; Robie, A. H., E. of, 226.

Non-resident Executor. A non-resident executor has no standing in Court which would entitle him to nominate an administrator. Murphy, Mary, E. of, 185.

Public Administrator. The Public Administrator has a right to administration only in intestacy. Where there is a will, the Court has discretion in the appointment. Nunan, Jeffrey, E. of, 238.

Grant of Letters.

Res adjudicata. What is thereby adjudicated. Unless there has been some contest on the point to work an estoppel, the heir is not, thereby, precluded from questioning, at a subsequent time, the right of the administrator to share in the estate, as heir, in the character of husband, or to be paid a claim, in the character of creditor. Haskell, Eliza, E. of, 204.

Revocation. Residence, as a jurisdictional requirement, may be enquired into at any time by a direct proceeding for revocation of letters. Milliken, T. J., E. of, 88.

Seaman's Estate. U. S. Shipping Commissioner has no right growing out of his office to letters of administration upon the effects, on shore, of a seaman decedent on a voyage to this port. The Act of Congress creating his office gives the Commissioner a right to those effects of the sailor on shipboard. Bedford, John, E. of, 60.

With Will annexed. The Court prefers to appoint Public Administrator rather than a Chinaman. Yee Yun, E. of, 181.

Witness. A creditor can testify as to the fact of the indebtedness of decedent to him on hearing of application for grant of letters. Welch, John, E. of, 202.

See Administration: Jurisdiction.

Grounds for Re-opening Account.

Minor, now of age, obtains settlement of account to be re-opened, for the reasons:

I. That executor made affidavit, as attorney in fact of a claimant, to a claim, which he thereafter allowed, as executor, and paid out of estate.

II. That he procured the allowance of his individual claim by his co-executor and the approval thereof by the Judge after the time for presentation of claims had elapsed. Keenan, John C., E. of, 186.

Grounds of Opposition.

To Sale of Real Estate. The fact that there is a litigated claim held by the estate against the devisee, on which, such devisee and debtor claims that there is nothing due, is no ground to be urged by such devisee against granting order of sale of real estate. It is not necessary to abide the determination of the litigation before granting order. Schroeder, H., E. of, 7.

Guardianship.

Distribution. Guardian of minor ward cannot consent to distribution to ward of estate subject to lien of executor for balance due him on settlement of account. Sweigert, Adam, E. of, 152.

Divorce. Minors, children of divorced parents. The father not appearing competent, and no good reason appearing why the mother should not be guardian, letters should issue to her as guardian of minor girls. Austerhaut, Minors, G. of, 18.

Guardianship.

Estopped from charging minor's estate with the expenses of minor's maintenance and education, when, as an inducement for the issuance of letters to him, he offered in Court to assume such expenses himself; and his offer was embodied in the order directing letters to issue to him. *Barg, John C., E. of, 69.*

Father of Minor. The father is entitled, (the mother being dead), to the guardianship of minor; subject, however, to such direction, as to the personal custody of the child, (which may be incorporated in order), as may be for the child's best interests.

Grounds for restriction: An unsettled life and harsh disposition, as grounds for restriction of father's custody of the child. *Linden, Irma, E. and G. of, 215.*

Foreign Funds. Moneys received by a guardian from a foreign country must be accounted for here, unless there is a positive showing that guardian has accounted for them before foreign tribunal, the presumption in the case being that the foreign court has permitted their transfer, to be administered at the domicile of guardian and ward. *Secchi, Minors, E. and G. of, 225.*

Investment of Funds. When a guardian deposits funds in a bank for safe keeping, he is responsible for loss only when he has placed them in a bank known to be unsafe. Where, however, a guardian loans funds imprudently and without security, it is his duty to assume the loss. *Post, Cornelia M., Minor, E. and G. of, 230.*

Jurisdiction. Residence. Application for letters of guardianship to be made in county where proposed ward resides. *Tittel, E. A. G. C., E. and G. of, 97.*

Step-child. When a guardian marries his ward's mother, the step-father, mother, and ward each having estate, the maintenance of the ward should be a charge upon all three. *Mohlenhauer, Maria, G. of, 162.*

See Account: Administration.

Guardianship of Insane Person.

Wife. Husband's application for guardianship of his insane wife denied, when it appears that there is a selfish motive for his seeking it; and it is doubtful if the welfare of the ward will be thereby subserved. *Fegan, Eliza, E. and G. of, 10.*

Habitual Intemperance.

Will. Mental incapacity from. Charge to Jury. *Black, James, E. of, 24.*

See Alcoholism.

Heir.

Death of Heir or Devisee Pending Distribution. The estate of such heir should first be administered and his interest in the estate of first decedent distributed; and the parties entitled under such distribution can then apply for the share in the estate of such first decedent to be set over to them. *Cronin, John and Johanna, E. of, 252.*

Heir.

Garnishment of Executor in suit against the Heir. The executor cannot be subject to garnishment for share of an heir before distribution. Sime, John, E. of, 100.

Widow. Surviving wife is heir to the exclusion of nephews or nieces of decedent, when he dies leaving no issue, father, mother, brother, or sister him surviving. Linehan, Patrick, E. of, 83.

Widow. In applying for partial distribution, the widow, as survivor of community, ranks as heir. Ricaud, J. P., E. of, 158.

Homestead.

Costs. On setting aside homestead, appraisers, reporter, and interpreter, the costs should be paid out of the estate. Ricaud, J. P., E. of, 158.

Exceeding Statutory Value. Widow. Where the widow, who is also administratrix, occupies, for a period after the return of the inventory, a homestead of a value greater than \$5,000, she should, in her accounts, be charged with rent therefor proportionally with the excess in value of the premises over the statutory amount. Titcomb, A. H., E. of, 55.

Jurisdiction Lost by Allotting it. When the Probate Court sets aside a homestead, it, thereafter, loses jurisdiction over the property; and cannot order a sale of it to pay mortgage lien on the lot. The remedy must be by foreclosure in District Court. Rondel, E. F., E. of, 70.

Partially used for other purposes. Property in part used for purposes other than a homestead, but included in declaration, cannot be set apart by decree. Reck, Henry, E. of, 59.

Premises not exclusively used as. Residence on lot held under a tenancy in common with strangers. Residence should be the principal use of the premises. Homestead Act of 1862 dispensed with the necessity of a written abandonment. Faithless wife, who was not, at the death of husband, a member of his family, not entitled to a homestead. Cameto, Martin, E. of, 42.

Widow, (there being no minor children), is entitled to have a homestead set apart to her by Probate Court. Ballentine, James, E. of, 86.

Widow, sole member of family. Unimproved lot, never used as a residence, allotted as homestead to a widow, there being no children. Motion to vacate order made six months afterwards by non-resident heir, on the ground of want of notice, was denied. Burns, Bernard, E. of, 155.

See Mortgage.

Husband and Wife.

Community Property. Bequest. An insurance policy, the premiums on which were payable out of husband's earnings, is community property. A bequest of the interest on \$4,000 to wife, until she re-marries, is a claim on the husband's separate estate, to be calculated from his death to the remarriage. Stans, John H., E. of, 5.

Husband and Wife.

Dealings between man and woman as Husband and Wife, such relationship being actually impossible, the man having a wife already;

HELD, not to constitute a partnership. First wife entitled to half of community property. *Winters, J. W., E. of, 131.*

Evidence. Wife cannot be questioned as to conversations between herself and husband upon any subject whatever. Such disability is not removed by the death of husband. *Low, C. L., E. of, 143.*

Guardianship of Insane Wife. Where it appears that the husband has selfish motives in seeking to be the guardian of his insane wife; and it is doubtful if her welfare will be subserved by appointing him, the Court will deny the application. *Fegan, Eliza, E. and G. of, 10.*

Guardianship of Minor Children of Divorced Parents. The father not being competent, and there being no objection to the mother, letters were issued to her as guardian of minor girls. *Austerhault, Minors, G. of, 18.*

Homestead. Faithless wife, not a member of decedent's family at his death, not entitled to claim a homestead out of his estate. *Cameto, Martin, E. of, 42.*

Marriage. Facts showing actual marriage, though no formal ceremony. *Titcomb, A. H., E. of, 55.*

Marriage Contract. Acknowledgment is essential to the execution of a marriage contract. A contract signed before marriage, but not acknowledged until eight years thereafter;

HELD, to be a nullity. (*Hittell's General Laws, Vol. I, Sec. 3576.*)

Where such contract is properly executed, the Probate Court has the right to consider it in determining manner of distributing estate. *Patton, Charles, E. of, 241.*

Presumption of Gift of Moneys in Bank. **HELD**, that joining husband's name with her own in her account at savings bank, was merely an authority to him to draw funds, and was revoked by her death. *Cunningham, Kate, E. of, 76.*

Residence of wife the same as the husband's, in determining the question for the purposes of jurisdiction of wife's estate. *Austin, Margaret, E. of, 237.*

Separate Real Estate. Expenditures thereon. Real property owned by either, before marriage, continues to be separate estate, notwithstanding the fact that community funds have been expended thereon, and may have enhanced its value, but such funds so expended may constitute a claim against the separate property in favor of the community. *Patton, Charles, E. of, 241.*

Support of Insane Wife. Husband is liable out of his own estate, when able to respond, for the support of his insane wife, notwithstanding the fact that she is possessed of ample separate estate. *Meyer, Marion, E. and G. of, 178.*

Husband and Wife.

Wife of Life Convict, a widow. A convict, under a sentence for life, is civilly dead. His wife, in such case, is a widow and entitled to take as legatee or devisee, where her widowhood is a condition for vesting the legacy or devise. Stott, William, E. of, 168.

See Marriage.

Illegitimacy.

Presumption of. The spurious offspring of an unfaithful wife, there being no cessation of intercourse between her and her husband, cannot claim, as illegitimate child of her paramour, to inherit from him. Sbarboro, Giovanni, E. of, 255.

Succession. Illegitimate half brother by the father's side cannot be an heir. Illegitimate half sisters by the mother's side, inherit.

Conflict between Sec. 1387 and 1388, 1388 prevailing in accordance with Sec. 4484, Political Code. Harriaon, W. B., E. of, 121.

Imprisonment.

Judgment of, for contempt, against executor, for failing to pay over distributed share of the estate. Taylor, R. D., E. of, 160.

Incompetent Person.

Guardianship. Residence. Application should be made in the county where proposed ward resides. Tittel, E. A. G. C., E. and G. of, 97.

Insane Wife.

Guardianship of Insane Wife. Where it appears that the husband has selfish motives in seeking to be the guardian of insane wife, and it is doubtful if her welfare will be secured by his appointment, the court will not entertain his petition. Fegan, Eliza, E. and G. of, 10.

Support of. Husband liable for support of insane wife, notwithstanding the fact that she has ample means of her own, provided he be able to respond. Meyer, Marion, E. and G. of, 178.

Insolvent's Debt.

Executor. It is not the duty of the executor to purgane an insolvent debtor at the estate's expense, unless he has reason to believe that something may be recovered. Stow, J. W., E. of, 97.

Insolvent Estate.

Deceased Executor. A balance due from a deceased executor on settlement of his account is not a preferred claim against his insolvent estate. Kehoe, John, E. of, 127.

Insurance Policy.

Community Property, when premiums paid out of husband's earnings. A bequest of interest on \$4,000 to wife until she re-marries, a claim on the husband's separate estate, to be calculated from his death to the re-marriage. Stans, John H., E. of, 5.

Insurance Policy.

Community Property. Premiums paid out of husband's earnings partly before and partly after marriage.

HELD, that policy was proportionally separate and common property. Webb, M. S., E. of, 93.

Intent.

Residence inferred from acts of decedent. His conflicting acts and assertions as to his intention. Where his election of residence was not sincere; but for a specious purpose, it must be disregarded. Samuel, Michael J., E. of, 228.

See Residence.

Interest.**Administrator Chargeable with Interest for Unreasonable Delay.**

Where administrator, after having collected funds of the estate, which can be distributed, delays, for no good reason, to file his account and close estate, he may be chargeable with interest. Seligman, Louis, E. of, 8.

Administrator is Entitled to Custody of Funds. He may deposit them in bank to his credit; and he will not be chargeable with interest, unless it appears that he has used them for his own benefit. Beideman, J. C., E. of, 66.

Annual rests. Executor chargeable with interest, to be compounded with annual rests, if he mingles the money of the estate with his own. Stott, William, E. of, 168.

Claim against Insolvent Estate. Interest allowed only at the statutory rate upon a mortgage claim, notwithstanding the fact that the mortgage stipulated for compound interest in case of default in payment; and the administratrix, who had paid the full claim in anticipation of the order of the court for payment of debts, was not allowed her payment of any excess over the statutory rate of ten per cent. Titcomb, A. H., E. of, 55.

Interest on Claim. When allowable. The allowance of a claim by administrator and Probate Judge is not such a proceeding as to make the claim rank as a judgment, and so, become interest-bearing. The claim is not a judgment, until it has passed through account and settlement, and has been ordered paid.

It is doubtful, if any claim bears interest, when the payment of interest could not be enforced against decedent, if he were alive. That is the true test. Selby, Thomas H., E. of, 125.

Keeping Funds in his own name. The administrator of an estate may deposit funds of estate in his own name at bank; and unless it fairly appears that he has used them for his own benefit, he will not be chargeable with interest. Beideman, J. C., E. of, 66.

Waiver of Interest on Claim by a stipulation endorsed on claim foregoing any demand beyond a sum named. Bleakley, Francis, E. of, 235.

Interpretation of Bequest.

Bequest, "to those of the above mentioned children who have attained the age of twenty-one years," held to apply only to those of such age at the death of testator, thus excluding those below that age. Crooke, Matthew, E. of, 247.

See Devise: Will.

Inventory.

Failure to File. Letters revoked for failure to file inventory, etc. Walsh, John, E. of, 251.

Notice to Creditors. The inventory must be the guide in determining whether there has been sufficient notice to creditors. If inventory shows property in excess of \$10,000, a four months' notice is a nullity. And the executor cannot show that property set forth in such inventory is not property of the estate. Loeven, Emil, E. of, 203.

Settlement of Account. The account of an administrator cannot be settled, until there has been appraisement of the property in inventory on file. Selna, Ubaldo, E. of, 233.

Investment of Funds.

Guardianship. When a guardian deposits funds in a bank for safe keeping, he is responsible for loss only when he has placed them in a bank known to be unsafe. Where, however, a guardian loans funds imprudently and without security, it is his duty to assume the loss. Post, Cornelia M., minor, E. and G. of, 230.

Issue of her body.

Devise. As applied to first beneficiary, the phrase, "issue of her body," creates a fee in her only, where such is the clear intention of testator. "Issue," not synonymous with "heire," within the rule of *Norris v. Hensley*, 27 Cal., 439. McDonnell, John., E. of, 94.

Judgment.

Claim when it becomes a Judgment. The allowance of a claim by executor and Probate Judge is not such a proceeding as will make the claim the judgment of a court, and thereby become interest bearing. The claim is not a judgment until it has passed through account and settlement, and has been ordered paid. It is further doubtful if any claim bears interest, when the payment of interest could not be enforced against decedent, if he were alive. Selby, Thomas H., E. of, 125.

Preferred Claim. A balance found due from an executor on settlement of account is not a judgment in the sense that would make it a preferred claim against his estate, which is insolvent. Such settlement is merely a finding that there is so much money in his hands, subject to administration. Kehoe, John, E. of, 127.

Presentation of Claim. The action was pending and verdict had in decedent's lifetime; but no judgment had until after his death, when the executors were substituted; appeal had; and final judgment payable in due course of administration, no claim having been presented.

HELD, that the objection should have been made in the District Court; that it comes too late after judgment. Page, Thomas S., E. of, 61.

Jurisdiction.

Appearance of Minors in open Court on the day of hearing. Such appearance cannot remedy the defect of want of service by mail or personal service of the notice of the hearing on probate of will; and the Court has no jurisdiction to proceed with the hearing. The proper way to remedy the defect of want of notice is to vacate all proceedings subsequent to the petition for probate, and proceed *de novo* to *publish* notice and serve minors in the statutory way. Bartels, Conrad, E. of, 130.

Defective Notice. On attention being called to the fact that a notice of probate is defective, the Court should, of its own motion, vacate all subsequent proceedings. Cameto, Mercedes, E. of, 75.

Devise, Interpretation of. The Probate Court has the power to construe the language of a will so as to ascertain the distributees. Crooks, Matthew, E. of, 247.

Devise, Interpretation of. Probate Court has equitable jurisdiction to interpret a devise in trust; to decide as to the legality of the trust; the parties entitled; and to distribute accordingly. Hinckley, William C., E. of, 189.

Guardianship. Residence. Application should be made in the county where proposed ward resides. Tittel, E. A. G. C., E. of, 97.

Homestead set aside by Decree. When the Probate Court sets aside a homestead, it thereafter loses jurisdiction over the property; and cannot order a sale of it to pay mortgage lien on the lot. The remedy must be by foreclosure in District Court. Rondel, E. F., E. of, 70.

Mortgage. The Probate Court has no jurisdiction to entertain an application by a lien-holder to enforce his lien upon chattels which it is the duty of the Court to allot to the widow as a provision for her support. The Court must set over the effects to the widow, and leave the mortgage creditor to seek elsewhere the enforcement of his claim. Fleury, Jean, E. of, 227.

No Estate. There must, actually, be estate to administer. Where the real object of the application for administration, is merely to clothe a person with the trust, so as to make him defendant in an action to quiet title, the petition will be denied. Murray, F. X., E. of, 208.

Recitals in Decree showing. Such recitals in decree showing that jurisdictional notice has been given (when affidavits on file are defective, but not antagonistic) can be attacked only by a showing that they are, in point of fact, untrue, and further, that the Court has been imposed upon. Rice, John D., E. of, 183.

Residence as a Jurisdictional Requirement. May be enquired into at any time by direct proceeding for revocation of letters.

Facts showing residence. Milliken, T. J., E. of, 88.

Residence inferred from acts of decedent. His conflicting acts and assertions as to his intention. Where his election of residence was not sincere, but for a specious purpose, it must be disregarded. Samuel, Michael J., E. of, 228.

Jurisdiction.

Residence of Wife. Wife's residence must be held to be the same as the husband's. Austin, Margaret, E. of, 237.

Trying Title. Probate Court, cannot try title as between an estate and a stranger. If there is a color of title in the estate to property, it is the duty of the Court to distribute it, though it may, at the same time, be the duty of the Court to decline to burthen its records with decrees professing to distribute estate, when there is clearly none to distribute. Dunn, John, E. of, 122.

Sale of Share of deceased Heir. The Court not having acquired jurisdiction of the heir's estate, it has no authority to order a sale of a distributive share of such heir held by a creditor as security for an indebtedness of heir. Hite, Ormsby, E. of, 232.

Jury.

Charge to. Contest of Probate. Black, James, E. of, 24; Crittenden, Howard, E. of, 50; Low, C. L., E. of, 143; Tittel, Frederica A., E. of, 12; O'Keefe, E. of, 154.

Removal of Administrator. Administrator not entitled to a jury on the trial of the issue joined on application for his removal. Doyle, Ellen, E. of, 68.

Verdict. The verdict of a jury on a contested probate stands on the same basis with a finding by a Judge, in so far as the right to apply for a revocation is concerned. Cunningham, Mary, E. of, 214.

See Will: Undue Influence.

Lapsed Legacy.

Relation. A step-son is not such a relation, as would, under Section 1310, C. C., prevent a legacy from lapsing. Pfuell, Margaretha, E. of, 38.

Legitimacy.

Conclusive Presumption of Legitimacy from uninterrupted intercourse of husband and wife, notwithstanding a claim advanced by mother, that the child is the spurious offspring of decedent and herself, and therefore, heir of decedent's estate. Sharhor, Giovanni, E. of, 255.

See Illegitimacy.

Letters of Administration.

No Estate. The real object of the application for letters being to clothe a person with the trust, so as to make him a defendant in an action to quiet title, there being no actual estate, the petition will be denied. Murray, F. X., E. of, 208.

See Administration: Grant of Letters.

Life Convict.

Wife, a widow. A convict under a sentence for life imprisonment, is civilly dead. His wife, in such case, is a widow, and entitled to take as legatee or devisee, where her widowhood is a condition for vesting a legacy or devise. Stott, William, E. of, 168.

Limitation upon Charitable Devises.

One-third of Gross Value of Estate. The one-third intended in Section 1313, C. C., as the limit of the power of testator to dispose of his property for charitable purposes, is one-third of the *gross* value of his estate, (not *net* value, after deducting debts). Hinckley, William C., E. of, 189.

See Devise: Will.

Loan.

Not a Deposit. Facts showing a transaction to be one of loan, and not deposit. A verbal contract to pay on demand: Statute of Limitations runs from date of loan. Galvin, John, E. of, 82.

Loaning Funds of an Estate.

Administrator liable, if he parts with the custody of the funds of the estate for any purpose, other than their security. Lacoste, Jean, E. of, 67.

See Administration.

Marriage.

Community Property. Notwithstanding the fact that community funds have been expended upon real estate, which was acquired before marriage, the property continues to be separate estate; but such expenditure may constitute a claim in favor of the community and against the separate estate. Patton, Charles, E. of, 241.

Evidence of. Meretricious Cohabitation, with or without promise of future marriage, does not constitute a marriage. Beverson, Claus, E. of, 35.

Evidence of. Meretricious relations, even where parties have, at times, for temporary purposes, held themselves out as husband and wife, raise no presumption of marriage. Howe, George L., E. of, 100.

No Formal Ceremony. Facts showing a marriage, though no formal ceremony. Titcomb, A. H., E. of, 55.

See Husband and Wife.

Marriage Contract.

Acknowledgment essential. An acknowledgment is part of the execution of a marriage contract. If not acknowledged, the instrument is a nullity. (Hittell's General Laws, Vol. I, Sec. 3576). Patton, Charles, E. of, 241.

Distribution. When it is properly executed, the Probate Court has the right to consider a marriage contract in determining manner of distributing estate. Patton, Charles, E. of, 241.

Married Woman.

Mortgage. Claim against her estate on mortgage given to secure husband's note. Held, to be ground for order of sale. Marden, Mary J., E. of, 184.

No Disability. Marriage is no disability as to the probate of will. Broderick, David C., E. of, 19.

Mental Incapacity.

Alcoholism. Will. When there has been mental incapacity arising from alcoholism proved, it is unnecessary to enquire further whether any person has used undue influence in procuring the execution of the will. Hannigan, Hepsabeth, E. of, 135.

Alcoholism. Will. Mental incapacity arising from alcoholism. Opinions of experts as to condition of testator's mind. Instructions to jury. O'Keefe, E. of, 154.

Old Age. Will. Charge to Jury. Tittel, Frederica A., E. of, 12.

Opium Habit. Will. Incapacity arising from the opium habit. Undue influence. Charge to jury. Crittenden, Howard, E. of, 50.

Pleading. Mental incapacity is, in itself, a fact, and a petition for revocation of probate, in which such fact is alleged is *pro tanto* good on demurrer. Clarke, Margaret T., E. of, 259.

See Charge to Jury.

Meretricious Relations.

Marriage. Such relations, with or without promise of future marriage, do not constitute marriage. Beverson, Claus, E. of, 35.

Marriage. Meretricious relations raise no presumption of marriage, even where parties, for temporary purposes, have held themselves out as husband and wife. Howe, Geo. L., E. of, 100.

Minor.

Guardian liable for Ward's Maintenance, when, on a contest for the guardianship, he offered to undertake at his own cost, the ward's maintenance; and such offer was embodied in the order of appointment. Barg, John C., E. of, 69.

See Guardianship.

Minor Heirs.

Attorney appointed by the Court cannot waive minor's right to ask for revocation of will, or in any way, bind minor. Devoe, James, E. of, 6.

Probate of Will. The appearance of minor heirs in open Court on the day of hearing is of no avail to cure want of notice to them by mailing or personal service. The proper course in case of such failure to give notice, is to vacate the proceedings under the petition, and publish notice and mail or serve personally, as required by the statute. A mere continuance for the purpose of serving minors is useless. Bartels, Conrad, E. of, 130.

Misrepresentation.

Fraudulent. Will. Charge to Jury. Black, James, E. of, 24; Tittel, Frederica A., E. of, 12.

See Charge to Jury.

Mortgage.

Devise of property subject, at death of testator, to a mortgage bearing interest;

HELD, that, under Sec. 1513, C. C. P., devisee was entitled to have mortgage paid out of the estate. Phinney, Arthur, E. of, 239.

Distribution, subject to. Where mortgage creditor is willing to release the remainder of the estate, and the devisees desire it, the court may distribute realty, subject to a mortgage. Hinckley, William C., E. of, 189.

Given by married woman to secure her husband's indebtedness, held to be good ground for order of sale of her separate estate. Marden, Mary J., E. of, 184.

Homestead. When the Probate Court sets aside a homestead, it thereafter loses jurisdiction over the property; and cannot order a sale of it to pay mortgage lien on the lot. The remedy must be by foreclosure. Rondel, E. F., E. of, 70.

Purchase by Trustee of Claim against Trust Estate. There is nothing adverse to the trust in the act of a trustee under a devise in trust purchasing a mortgage already in existence, which is a lien upon the trust estate. Such purchase and holding may actually be for the interest of the trust. Hinckley, Wm. C., E. of, 189.

Narcotics.

Will. Mental incapacity arising from the opium habit. Charge to Jury. Crittenden, Howard, E. of, 50.

Nephews and Nieces.

Succession. Where decedent leaves no issue, father, mother, brother, or sister, but does leave a wife, and also, children of a deceased brother or sister, the wife is heir, to the exclusion of such nephews and nieces. In case of her death before distribution, her children are entitled to have distribution directly to them. Linehan, Patrick, E. of, 83.

Non-resident.

Notice. The widow, who was also administratrix, applied to the Court January 26, 1877, and had allotted to her, as a homestead, an unimproved parcel of real estate, which had never been used as a residence.

The non-resident heirs (brothers and sisters, there being no children), asked to have the homestead order vacated, (their petition was filed July 16, 1877), but the application was denied. Burns, Bernard, E. of, 155.

See Residence.

Notice.

Jurisdiction. Recitals in decree showing that jurisdictional notice has been given (when the affidavits on file are defective, but not antagonistic), can be attacked only by a showing that they are in point of fact untrue; and further, that the court has been imposed upon. *Rice, John D., E. of, 183.*

Non-residents. The widow, who was also administratrix, applied to the Court, January 26, 1877, and had set apart to her, as a homestead, an unimproved lot.

The heirs, who were non-residents, applied, July 16, 1877, to have the order vacated on the ground, that they had received no notice. The application was denied. *Burns, Bernard, E. of, 155.*

Sale of Real Estate. First publication June 19th, last, July 9th;

HELD, to be a sufficient publication for twenty-one days. *Osgood, A. O., E. of, 153.*

Variance between Notice and Bid. Where there is a variance between an order and notice of sale and the purchaser's written bid, the purchaser is bound by his bid, and cannot have the sale set aside on the ground of the variance. *Otis, James, E. of, 222.*

Notice of Probate.

Defective. Proceedings, a nullity. On suggestion, that notice of probate is defective, the court, of its own motion, should examine and vacate all proceedings subsequent to and dependent on such imperfect notice. *Cameto, Mercedes, E. of, 75.*

Minors. The appearance of minors in court is and can be no waiver of the statutory notice of ten days to be given by mailing or by personal service. Nor can the defective service be remedied by a continuance for the purpose of giving minors proper notice. All proceedings had subsequently to the filing of petition should be vacated; a new order entered; and another notice published. *Bartels, Conrad, E. of, 130.*

See Notice.

Notice to Creditors.

Value of Estate. The notice to creditors must be based on the value of the estate, to be determined by inventory and appraisal.

When inventory shows exceeding \$10,000 in property, a four months' notice is a nullity. Executor is not permitted to contradict the inventory in that regard. *Loeven, Emil, E. of, 203.*

Opium Habit.

Mental Incapacity. Cause of. Charge to Jury. *Crittenden, Howard, E. of, 50.*

Opposition to Probate.

Pleading. An opposition to the probate of a will, on the ground of menace, undue influence, etc., should disclose the facts constituting the improper conduct. *Myers, Margaret, E. of, 205.*

See Charge to Jury: Will: Pleading.

Order for Payment of a Sum of Money. Gift inter vivos.

Order by Decedent for a Sum of Money not collected until after his death;

HELD, to be a valid gift *inter vivos*. Cronan, Thomas, E. of, 72.

Orphan Asylum.

Will. Charitable Society. The Boys' Roman Catholic Orphan Asylum at San Rafael, is a charitable and benevolent society; and, as such, is entitled, under Sec. 1313, C. C., to take a bequest. Tobin, Richard, E. of, 134.

Partial Distribution.

Community Property. Although widow takes her share of the community estate as survivor, and not as heir, she may, nevertheless, apply for it to be set apart to her by partial distribution. In that connection, the word, *heir*, includes the widow as *survivor*. Ricaud, J. P., E. of, 158.

See Distribution.

Partition.

Administrator's Commissions. In case of property undergoing partition in District Court, the administrator should be allowed commissions, only on the net proceeds of partition sale coming to estate. Marvin, C. B., E. of, 163.

Partner.

Beneficiary under Will. The fact that partner is a beneficiary under will is no evidence that such partner has exercised any undue influence. Brooks, Edmund, E. of, 141.

Partnership.

Void Marriage. Dealings between man and woman, as husband and wife, such relationship being impossible, (there being an undissolved former marriage), cannot be held to constitute a partnership.

Wife under former marriage is entitled to half of the property as community property. Winters, J. W., E. of, 131.

Paternity.

Spurious Offspring of an Adulterous Wife. Acts of a paramour in recognition of his paternity of such offspring cannot be deemed to constitute adoption, so as to entitle the child to inherit from him. Sharboro, Giovanni, E. of, 255.

Perpetuity.

Right to Alienate. A devise in trust coupled with power to alienate is not a perpetuity. Hinckley, William C., E. of, 189.

Pleading.

Opposition to Probate. An opposition to the probate of a will, on the ground of menace, undue influence, etc., should disclose the facts constituting the improper conduct. Myers, Margaret, E. of, 205.

Pleading.

Revocation of Probate. A general demurrer will not lie to a petition which, among other grounds for revocation, alleges that testatrix was not, at the date of the execution of supposed will, of sound and disposing mind, unsoundness of mind being, in itself, a properly pleadable fact.

But in alleging restraint, undue influence, or fraudulent misrepresentation, the facts constituting such restraint, undue influence, or fraudulent misrepresentation must be set forth.

It is not essential that the persons exercising such restraint, or influence, or who may have made the misrepresentations, should be designated. It may be known to the petitioners, that such restraint or influence may have been exercised, or that misrepresentation may have been made without the names of the offending parties being known to petitioners. *Clarke, Margaret T.*, E. of, 259.

Pledge.

Estate's Interest Therein. In estimating the value of the estate to be administered, the Court should look to the probable excess in value of the pledge over the secured indebtedness, to fix the value of estate's interest therein. *Kidd, George W.*, E. of, 239.

Redemption by Administrator. Administrator may redeem pledged property without the presentation of any claim for the secured debt; but in so doing, he takes the risk that the pledge is worth the debt. *Eidenmuller, George*, E. of, 87.

Practice.

Defective Notice. Proceedings void by reason of defective notice. The court should, of its own motion, on attention being called thereto, vacate all subsequent proceedings. *Cameto, Mercedes*, E. of, 75.

Defective Service of Notice on Probate hearing. Where the Court failed to acquire jurisdiction of minors by reason of failure to mail or personally serve notice of probate hearing on minor heirs, appearance of the minors in court is ineffectual to cure the defect; and the only way to correct the error is to vacate all proceedings subsequent to the filing of the petition, and proceed to publish a new notice. *Bartels, Conrad*, E. of, 130.

Jury. A verdict by a jury on a contested probate is no more binding on all parties than is a finding by the Judge, in so far as the right to petition for a revocation is concerned. *Cunningham, Mary*, E. of, 214.

Moving Party on Contest of Probate. On a probate contest, the contestant is plaintiff, and should proceed. *Collins, Thomas*, E. of, 73.

Removal of Administrator. An administrator is not entitled to a jury on the trial of the issue joined on an application for his removal. *Doyle, Ellen*, E. of, 68.

Revocation of Probate. When the year expires in which to apply for. The petition was handed to the Judge late in the evening of Dec. 2, 1879, to revoke probate of will admitted, Dec. 2, 1878; and by the Judge, delivered to the Clerk on the day following, with instructions to file as of Dec. 2.

HELD, to be in time; and that citation based thereon need not issue within the year. *Sharboro, Giovanni*, E. of, 255.

See Pleading.

Precatory Words in Will.

Devise. "To wife's use and interest, and those of children," with power of disposition;

HELD, to be merely precatory words. Glass, Julius, E. of, 213.

Devise. "To my beloved wife, the whole of my property, *for her own use and benefit* and to maintain and support my said children with, the same to be *hers absolutely.*"

HELD, to vest estate in wife absolutely. Molk, John H., E. of, 212.

See Will.

Preferred Claim.

Account of Executor. A settled account of an executor who has died, and whose estate is insolvent, is not a judgment in the sense that would make the balance found thereby against him, a preferred claim against his estate. Kehoe, John, E. of, 127.

See Claim.

Pretermission of Illegitimate Child.

Will. An illegitimate child inherits from her mother, if there be no mention of such child in the will, as pretermitted. Wardell, Ada, E. of, 224.

Privileged Communications.

Evidence. Husband and Wife. Neither party can be examined as a witness touching conversations had between them even after the death of the other. Low, C. L., E. of, 143.

Probate.

Attestation. One witness to a will may attest the mark of his illiterate co-witness. Derry, William R., E. of, 202.

Contest. On a probate contest, the contestant is plaintiff and should proceed. Collins, Thomas, E. of, 73.

Contest. Mental Incapacity. Alcoholism. Undue influence. When it is found that the proposed testatrix was mentally incapable by reason of chronic alcoholism, it is unnecessary to look further to see if undue influence has been exerted in procuring the will in contest. Hannigan, Hepzabeth, E. of, 135.

Contest. Undue Influence. The fact that decedent's partner is a beneficiary under a will raises no presumption that such partner has procured making of will by undue influence. Brooks, Edmund, E. of, 141.

Newly Discovered Codicil must be offered for probate within a year from the date of the probate of the original will, or it is barred, the proposing of such codicil for probate being a contest of the original will. Adait, Elizabeth, E. of, 266.

Notice. Res adjudicata. Where the affidavits on file proving notice are defective, but not antagonistic to the recitals of the decree, such recitals can be attacked only by a showing that they are untrue in point of fact, and further, that the Court was imposed upon by the evidence offered in the premises. Rice, John D., E. of, 183.

Probate.

Pleading. Opposition to Probate of will should, when the grounds are menace, undue influence, etc., disclose the facts constituting the improper conduct. Myers, Margaret M., E. of, 205; Clarke, Margaret T., E. of, 259.

Probate Record.

Extraneous documents merely referred to in will, need not be made part of the probate record. Myers, Margaret M., E. of, 205.

Public Administrator.

Grant of Letters. The Public Administrator has a right to administer, only in cases of intestacy. Where there is a will, the Court has discretion in the appointment. Nunan, Jeffrey, E. of, 238.

Grant of Letters. Non-resident widow's nominee entitled, as against Public Administrator. Robie, A. H., E. of, 226; Cotter, Henry B., E. of, 179.

Grant of Letters. Chinaman. The Court prefers to nominate the Public Administrator rather than a Chinaman, whose permanent residence here is doubtful, in cases of administration with the will annexed. Yee Yun, E. of, 181.

Revocation of Letters for failure to file inventory, etc. Walsh, John, E. of, 251.

Purchaser at Probate Sale.

Bound by his Bid. Where there is a variance between an order and notice of sale and the written bid, the purchaser is not, on that account, entitled to have confirmation set aside, and himself released. Otis, James, E. of, 222.

Devise with Power to Sell. A purchaser at a sale made under a devise to executors with power to sell may apply to the Court for distribution to him directly, of the purchased property. No confirmation of such sale is required. Delany, Matthew, E. of, 9.

Redemption of Pledged Property.

Claim. The administrator may redeem pledged property without the presentation of any claim for the secured debt; but in so doing, he takes the risk that the pledge is worth the debt. Eidenmuller, George, E. of, 87.

Removal of Administrator.

Jury. Administrator not entitled to a jury to try the issues on application for his removal. Doyle, Ellen, E. of, 68.

Rents Pending Administration.

Homestead. When the widow, who is also administratrix, remained in possession of homestead premises after return of inventory; and it appeared that such premises exceeded \$5,000 in value;

HELD, that she should account to the estate for a portion of the rent of the premises proportionate with such excess in value. Titcomb, A. H., E. of, 55.

Rents Pending Administration.

Property Conditionally Devised. Where a parcel of land has been devised on the condition that devisee pay a charge thereon of one thousand dollars, the executrix should collect the rents and pay the taxes thereon, until the condition has been satisfied. Broad, Charles, E. of, 188.

Renunciation.

Widow. A renunciation by testate decedent's widow of "all claim to my estate except under this will," is not a renunciation of widow's share of community property. She takes such share as *survivor*, not as *heir*. Mumford, George H., E. of, 133.

Res Adjudicata.

Claim allowed by one of two administrators, and reported before its allowance by Probate Judge in his first annual account—a second annual account not referring to the claim was allowed. A petition for sale of real estate was filed; and, on hearing, the claim was objected to. The question was reserved; and subsequently the heirs asked to be permitted to contest it.

HELD, that there had been no final adjudication on the claim. Whitmore, H. M., E. of, 103.

Grant of Letters. What is thereby adjudicated. Whether there is property; whether the Court has jurisdiction; and whether the applicant for letters is competent, there being no such contest as to the allegation of petition as will work an estoppel.

When letters have been granted to a person, whether claiming the grant as heir or creditor, and there has been no contest on such claim, to act as an estoppel, the question of heirship or of the validity of the claim as creditor must still be open to be passed upon in an independent proceeding. Haskell, Eliza, E. of, 204.

Recitals in Decree. Such recitals showing that jurisdictional notice has been given, (where the affidavits on file are defective, but not antagonistic), can be attacked only by a showing, not only, that they are untrue in fact, but also, that the Court has been imposed upon in the evidence. Rice, John D., E. of, 183.

Residence.

Grant of Letters. Nominee of non-resident widow, entitled to letters over Public Administrator. Cotter, Henry B., E. of, 179; Robie, A. H., E. of, 226.

Nominee of Non-resident executor is not entitled as against Public Administrator. Murphy, Mary, E. of, 185.

Jurisdiction. Residence as a jurisdictional requirement may be enquired into at any time by a direct proceeding for revocation of letters. Facts showing residence. Milliken, T. J., E. of, 88.

Jurisdiction. Residence inferred from acts of decedent. His conflicting acts and assertions as to his intention. Where his election of residence was not sincere, but for a specious purpose, it must be disregarded. Samuel, Michael J., E. of, 228.

Residence.

Jurisdiction. Guardianship. Application should be made in county where proposed ward resides. Tittel, E. A. G. C., E. and G. of, 97.

Non-resident Executor, has no standing in Court which would entitle him to nominate an administrator. Murphy, Mary, E. of, 185.

Wife. Jurisdiction as affected by residence. Wife's residence must be held to be the same as the husband's. Austin, Margaret, E. of, 237.

See Alien: Domicile: Non-resident.

Restraint.

Will. Charge to Jury. Tittel, Frederica A., E. of, 12; Black, James, E. of, 24.

Revocation of Letters.

Public Administrator. Grounds. Failure to file inventory. Walsh, John, E. of, 251.

Residence as a jurisdictional requirement may be enquired into at any time by a direct proceeding for revocation of letters. Milliken, T. J., E. of, 88.

What is Mal-administration. It is no ground for revocation of letters that executors have not filed their accounts; the law is merely directory on that point; and there may be good reasons for delay.

It is no ground for revocation that executors have failed to sue for debts appraised as valueless. It is not the duty of executor to pursue an insolvent endorser at the expense of the estate, especially, where the endorser is a corporation not apparently organized for the purpose of guarantee on notes.

Executors have no right to pay assessments on stock shares, unless they, themselves, or the heirs or creditors are prepared to take the risk that the stock will return the assessment paid. Such failure to pay assessments is not mal-administration.

All these matters are proper to be heard on settlement of account; and even if they were injuries to the estate, they might be simple errors in judgment, for which executors could not be held liable. Stow, J. W., E. of, 97.

Revocation of Probate.

Attorney appointed by the Court to represent minor heirs on contest of will cannot waive minor's right to revoke probate, or bind the minor. Devoe, James, E. of, 6.

Attorney for Minors on probate of will is not entitled to institute proceedings to revoke probate. Cameto, Mercedes, E. of, 75.

Limitation of One Year to apply for. When it expires. Petition handed to the Judge late in the evening of Dec. 2, 1879, to revoke probate of will admitted, Dec. 2, 1878, and by the Judge, delivered to the Clerk on the day following, with instructions to file as of Dec. 2, 1879.

HELD, to be in time. **CITATION** need not issue before expiration of year. Sbarboro, Giovanni, E. of, 255.

Revocation of Probate.

Newly Discovered Codicil must be offered for probate within a year from date of probate of original will, such offer being in the nature of a contest of such original will. *Adsit, Elizabeth, E. of, 266.*

Non-resident Alien, after ten years from probate has no interest in estate, which would entitle her, as heir, to apply for revocation of probate. It is possible that five years works an escheat in the estate. *Broderick, David C., E. of, 19.*

Pleading. A general demurrer will not lie to a petition which, among other grounds for revocation, alleges that testatrix was not, at the date of execution of supposed will, of sound and disposing mind. Such an averment is a proper allegation of an issuable fact, to wit: the fact of unsoundness of mind. *Clarke, Margaret T., E. of, 259.*

But in alleging restraint, undue influence, or fraudulent misrepresentation, the facts constituting such restraint, undue influence, or fraudulent misrepresentation must be set forth. *Clarke, Margaret T., E. of, 259; Myers, Margaret M., E. of, 205.*

It is not essential that the persons exercising such restraint, or influence, or making the misrepresentations be actually designated. The petitioners for revocation may know that the will is a nullity by reason of the matters recited, and yet not know the parties guilty of the fraudulent conduct. *Clarke, Margaret T., E. of, 259.*

Revocation of Will.

Revoked by safe return from a particular voyage. *White, J. B., E. of, 157.*

Right to Administer.

Non-resident Executor has no standing in Court which would entitle him to nominate an administrator. *Murphy, Mary, E. of, 185.*

Non-resident Widow has the right to nominate administrator over the Public Administrator. *Cotter, Henry B., E. of, 179; Robie, A. H., E. of, 226.*

See Grant of Letters.

Sale of Real Estate.

Broker, Contract with. A contract for the sale of real estate through a broker wherein it is stipulated that the broker shall, for his remuneration, have all the property brings above a given sum, cannot be supported, notwithstanding such net amount be a fair price for the property. *Ballentine, James, E. of, 86.*

Devise to Executors does not require confirmation. A sale of real estate by an executor under a devise does not require confirmation by the Court. Grantee is entitled under his deed to have the land distributed directly to himself. *Delany, Matthew, E. of, 9.*

Grounds of Oppositon. The fact that there is a litigated claim held by the estate against the devisee, on which, such devisee and debtor claims that there is nothing due, is no ground to be urged by such devisee against granting order of sale of real estate. It is not necessary to abide determination of litigation before granting order. *Schroeder, H., E. of, 7.*

Sale of Real Estate.

Married Woman's Estate. Claim against. A claim upon a mortgage by married woman given to secure husband's debt held to be ground for order of sale. Marden, Mary J., E. of, 184.

Specific Devise to repay Executor's disbursements for taxes. A sale of property specifically devised may be had by executor, to reimburse himself for disbursements for taxes and assessments attaching to the devised estate, which it was his duty, pending administration, to keep paid. Mogan, A., E. of, 80.

Sufficiency of Notice. First publication June 19th; last, July 9th; HELD, to be a good publication for twenty-one days. Osgood, A. O., E. of, 153.

Written Bid. Where there is a variance between an order and notice of sale and the written bid, the purchaser is not entitled to have confirmation of sale set aside and himself released from his purchase on the ground of such variance. Otis, James, E. of, 222.

Sale of Share of Deceased Heir.

Court has no authority to order. The Court has no authority to order a sale of the share of deceased heir, (not having acquired jurisdiction to administer his estate), to pay a debt secured by the assignment of such share. Hite, Ormsby, E. of, 232.

Seaman's Estate.

U. S. Shipping Commissioner. Seaman's Estate on shore. The U. S. Shipping Commissioner has no standing in Court, under the act creating his office, to enable him to apply for letters of administration. His duty extends only to effects *on shipboard* belonging to a seaman dying on voyage to this port. Bedford, John, E. of, 60.

Separate Estate.

Community Funds expended upon the separate estate of either husband or wife do not thereby make it common property; but such expenditure may constitute a claim against such separate estate in favor of the community. Patton, Charles, E. of, 241.

Homestead. Unimproved lot, never used as a residence, set apart to widow, there being no children, and the heirs being non-resident brothers and sisters;

Application by heirs that widow, who is also administratrix, include such property in her accounts, the same being separate estate of decedent, denied. Burns, Bernard, E. of, 155.

Married woman. A mortgage given by a married woman, upon her separate property, to secure her husband's debt, held to be a ground for order of sale; such debt being a "debt against decedent." Marden, Mary J., E. of, 184.

Policy of Insurance. That proportional part of a policy of insurance for which the premiums were paid by husband before marriage, is separate. Webb, M. S., E. of, 93.

Separate Estate.

Wife's Estate. Where an account has been placed by the wife in the joint names of herself and husband, such a transaction is merely authority to husband to draw, revoked by her death; and the fund remains her separate estate. Cunningham, Katie, E. of, 76.

Settlement of Account.

See Account.

Shipping Commissioner of U. S.

Seaman's Property. U. S. Shipping Commissioner has no right, under Act of Congress creating the office, to apply for letters of administration upon the property *on shore* of a seaman decedent on voyage to this port. The Commissioner's right of possession extends only to the effects of the seaman on *ship-board*. Bedford, John, E. of, 60.

Signature.

Different requirements as to Olographic and Attested Will. A signature to an olographic will need not be subscribed at the foot of the instrument. A signature to a will attested by witnesses *must be* a subscription. Barker, Martha L., E. of, 78.

In the Body of the Will. The signature to an olographic will in this form, "This is the last will of Philip Donoho," held to be sufficient. Donoho, Philip, E. of, 140.

Not necessarily a subscription, when to Olographic Will. Signature need not be a subscription. Johnson, George W., E. of, 5.

Partial, by Witness to a Will. The signature of a witness appears to have been only partially traced, and probate must be denied. Winslow, Edward, E. of, 124.

Subscription. To other than Olographic Will should be at the foot of the instrument. A signature placed before the clause nominating executor: *HELD*, to be effectual as a signed will *for all that precedes the signature*. McCullough, John, E. of, 76.

Written by another, Will. Name of proposed testator written by another person not a witness to the will; and not in the presence of the witnesses.

HELD, that the testator should have called the attention of the witnesses to the fact that he had signed the document; and that it had been subscribed by him or by his authority. Taney, Patrick, E. of, 210.

Statute of Limitations.

Claim. The allowance of a claim stops the running of the statute. Schroeder, H., E. of, 7.

Loan on Verbal Contract to Repay. Transaction one of loan, and not a deposit. A verbal contract to pay on demand. Statute runs from date of loan. Galvin, John, E. of, 82.

Statutes, State of California, Construed.

Escheat. 1856, p. 137. Broderick, David C., E. of, 19.

Homestead. 1862, p. 519; 1867-8, p. 116, Cameto, Martin, E. of, 42.

See Codes.

Statutes, U. S. at Large, Construed.

Shipping Commissioner. Title 53, Ch. 3, p. 883. Bedford, E. of, 60.

Cutting Timber on Public Land, p. 1049, Sec. 5388. Whitmore, E. of, 103.

Stay of Proceedings.

Contested Will. Appeal in the matter of a contested will works a stay of proceedings. Cunningham, Mary, E. of, 214.

Stepchild.

Support of. When a guardian marries his ward's mother, the guardian, mother, and ward, each having estate, the maintenance of the ward should be borne by all three, to be assessed equitably upon them by the Court. Mohlenhauer, Maria, E. of, 162.

Stepson.

Relation. A stepson is not such a relation as would, under Section 1310, C. C., prevent a legacy from lapsing. Pfuell, Margaretha, E. of, 38.

Subscription to Will.

See Signature.

Succession.

Contract. Foreign Law, unless made part of a contract affecting succession, is to be disregarded. Baubichon, J. B., E. of, 55.

Devise. A future contingent interest vests in the beneficiary so as to be the subject of a succession. Selna, Ubaldo, E. of, 233.

Illegitimacy. An illegitimate half-brother, by the father's side, cannot be an heir.

Illegitimate half-sisters, by the mother's side, inherit. Conflict between Secs. 1387 and 1388, C. C.; Sec. 1388 prevailing in accordance with Sec. 4484, Political Code. Harrison, W. B., E. of, 121.

Nephews and Nieces excluded unless there is a deceased brother or sister to inherit with them, when decedent leaves no issue, father, or mother, but leaves a wife, the wife taking entire estate. Linehan, Patrick, E. of, 83.

Will. Pretermission of Illegitimate Child. An illegitimate child, there being no mention of her in will, inherits, as pretermitted. Wardell, Ada, E. of, 224.

See Distribution.

Survivor.

Partial Distribution, Widow surviving, Entitled to. Widow, as survivor of community, is entitled to apply for partial distribution to her of her share of community property; and in that connection, ranks as heir. Ricaud, J. P., E. of, 158.

Survivorship.

Will. Devise to two beneficiaries and to the survivor, in case either dies before distribution.

HELD, that survivor takes estate to the exclusion of grantee of deceased beneficiary. Cronin, John and Johanna, E. of, 252.

Taxes.

Conditional Devise. Executrix should pay taxes on property conditionally devised, until there has been compliance by devisee with the condition. Broad, Charles, E. of, 188.

Specific Devise. Taxes and Assessments upon specific devise should, pending the administration, be paid by executor, to be re-imbursed by the devisee on distribution. Should the devisee decline to pay, the executor may have an order of sale of devised property for his outlay. Mogan, A., E. of, 80.

Tenancy in Common.

Homestead. Residence, to comply with the Homestead Act, (Statutes 1867-8, p. 116), must be the principal use, to which the premises are devoted. Living over a shop used by both the tenants in common as a place of business is but a secondary use of the premises. Cameto, Martin, E. of, 42.

Trust.

Delayed Distribution. Will. A devise whereby the only trust created is that of executorship, and distribution thereby postponed until a given time. Marvin, C. B., E. of, 163.

Trust Failing by Death of Beneficiary, Trustees entitled to their Expenses. In a trust which has failed by reason of death of beneficiary, the trustees should be paid expenses legitimately incurred by them. Hinckley, William C., E. of, 189.

Verbal Instructions to Devisee. *Quære:* Whether loose verbal instructions given to beneficiary while drafting a will raise any presumption of a trust. Brooks, Edmund, E. of, 141.

See Devise.

Trustee as Purchaser of Outstanding Mortgage.

Not Adverse to his Trust. There is nothing adverse to trust in the purchase, by a trustee, of an outstanding mortgage against the fund in trust. It may actually be a benefit to the fund that such mortgage should be controlled by a trustee. Hinckley, William C., E. of, 189.

Undue Influence.

Mental Incapacity. Narcotics. Charge to Jury. Crittenden, Howard, E. of, 50.

Undue Influence.**Mental Incapacity existing, no need of finding Undue Influence.**

It is not necessary to consider whether or no, there has been undue influence exerted upon the mind of a testatrix, to procure the execution of a particular testamentary disposition, when it is found that such proposed testatrix was mentally incapacitated by reason of chronic alcoholism. Hannigan, Hepsabeth, E. of, 135.

Partner. The fact that a partner is a beneficiary under a will is no evidence of undue influence exercised by him. Brooks, Edmund, E. of, 141.

Pleading. The facts constituting the undue influence, menace, etc., should be set forth in the opposition to probate. Myers, Margaret M., E. of, 205; Clarke, Margaret T., E. of, 259.

Wife. Undue influence by wife to the exclusion of son. Charge to Jury. Low, C. L., E. of, 143.

Will. Charge to Jury. Tittel, Frederica A., E. of, 12.

Will, Drafted by Beneficiary. The fact that the will was drafted by beneficiary is, at most, a suspicious circumstance; in itself, it raises no presumption of undue influence. Byrne, H. H., E. of, 1.

Will. Misrepresentation. Charge to Jury. Black, James, E. of, 24.

See Revocation of Probate and Probate.

Unimproved Lot.

Homestead. An unimproved lot, never used as a residence, set apart as a homestead to widow, there being no minor heirs. Burns, Bernard, E. of, 155.

Uses.

See Devise: Trusts: Will.

Verdict.

How far Conclusive. The verdict of a jury on a contested probate stands on the same basis with a finding by the Judge, in so far as the right to apply for revocation is concerned. Cunningham, Mary, E. of, 214.

Waiver.

Claim. Interest on. A stipulation endorsed on a claim foregoing any demand thereon beyond a sum named, waives interest thereon. Bleakley, Francis, E. of, 235.

Presentation of Claim. The action was pending and a verdict had in decedent's lifetime; but no judgment entered until after his death, when the executors were substituted; an appeal had; and final judgment to be paid in due course of administration, no claim having been presented.

HELD, that the failure to object to want of presentation should have been made in District Court; that it comes too late after judgment. Page, Thomas S., E. of, 61.

Ward, Guardian and,

See Guardianship.

Widow.

Entitled to Partial Distribution as Heir. On partial distribution, although widow takes as survivor of community, yet the term, heir, includes her, so as to entitle her to apply for her share of community property. Ricand, J. P., E. of, 158.

Grant of Letters. Non-resident Widow, entitled, as against Public Administrator, to nominate administrator. Robie, A. H., E. of, 226; Cotter, Henry B., E. of, 179.

Homestead. Widow entitled to have a homestead, allotted to her by the Probate Court, although there are no minor children. Ballentine, James, E. of, 86.

Homestead. When the widow, who is also administratrix, remained in possession of homestead premises after return of inventory; and it appeared that such premises exceeded \$5,000 in value;

HELD, that she should account to the estate for a portion of the rent of the premises proportionate with such excess in value. Titcomb, A. H., E. of, 55.

Homestead. Unimproved lot set apart to widow, there being no children. Motion to vacate order setting it apart made by non-resident six months afterwards, denied. Burns, Bernard, E. of, 155.

Renunciation by, under Will. A renunciation by widow of "all claim to my estate except under this will," is not a renunciation of widow's share of community property. She takes such share as survivor, not as heir. Mumford, George H., E. of, 183.

Wife of a Life Convict, who must be considered civilly dead. The wife of a convict under a sentence for life, is a widow, and as such, entitled to take a legacy or devise, where widowhood is the condition of its vesting. Stott, William, E. of, 168.

Widow's Allowance.

Wife Separated from her Husband under circumstances which would preclude her from the right, in his lifetime, to call on him for support, is not entitled to a widow's allowance, she being, in no sense, a member of his family. Byrne, H. H., E. of, 1.

Wife.

As Witness. Wife cannot be questioned as to conversations between herself and husband upon any subject whatever. Such disability as witness is not removed by death of husband. Low, C. L., E. of, 143.

Heir. Surviving Wife is heir, to the exclusion of nephews and nieces, when there is no issue, father, mother, brother, or sister surviving. To enable nephews or nieces to share in the estate, there must be a brother or sister surviving to take with them. Linehan, Patrick, E. of, 83.

Wife.

Will. Undue influence by wife to exclusion of son. Charge to Jury. Low, C. L., E. of, 143.

See Widow.

Will. Administration.

Non-resident Executor. In case of a will, the Court has discretion as to appointee as administrator. There being no valid reason urged against it, preference is given to a public officer, who is more subject to Court's control than a private person. Murphy, Mary, E. of, 185.

Public Administrator. Letters issued to Public Administrator, rather than to a Chinaman, unacquainted with our laws and language, and whose permanent residence here is doubtful. Yee Yun, E. of, 181.

See Administration: Grant of Letters.

Will. Adoption Recited in.

Recital in Will. A statement in will "A. B., my adopted son," is *prima facie* evidence of such relationship, so as to entitle the person named to apply himself or nominate an applicant for letters. Keenan, John C. E. of, 186.

Will. Attorney for Minors.

Revocation of Probate. Attorney appointed by Court to represent minors on probate of will, not entitled to institute proceedings for a revocation of will. Cameto, Mercedes, E. of, 75.

Will. Bequest.

Bequest to a Religious Corporation. Void, under Sec. 1275, Civil Code. Wright, Mary, E. of, 218.

Will. Bequest in Trust Failing by reason of Death.

Death. When bequest in trust fails by reason of the death of the beneficiary, trustees should be paid expenses incurred in behalf of trust. Hinckley, William C., E. of, 189.

Will. Bequest, Charitable.

Devise or Bequest to Charitable or Benevolent Society. The Boys' Roman Catholic Orphan Asylum at San Rafael, is a charitable and benevolent society under Sec. 1313, C. C., and, as such, is entitled to take a bequest. Tobin, Richard, E. of, 134.

Will. Bequest in Trust Failing for want of Distributee.

Distribution of Bequest. A similar association, organized for analogous purposes subsequently to the death of testator, cannot take a bequest conditioned, that if at the date of testator's death, a certain organization intended as the beneficiary had ceased to exist, the fund should be otherwise appropriated, such beneficiary having ceased to exist at testator's death. Neil, Thomas, E. of, 79.

Will. Cancellation of Clause.

Cancellation of a single Clause. When the intent to cancel a single clause in a will is clearly made out, the will should be admitted to probate without such clause. Chinmark, Moses, E. of, 128.

Will. Codicil Discovered after Probate.

Codicil Subsequently Discovered. Must be offered for probate within a year from the date of probate of original will, the proposing of such codicil for probate being in the nature of a contest of the original will. *Adsit, Elizabeth, E. of, 266.*

Will as to Community Property.

Husband's Will affects only his Share therein. Widow's Share of Community. She takes it as survivor, not as heir. A renunciation of "all claim to my estate except under this will," is not a renunciation of widow's share of community. *Mumford, George H., E. of, 133.*

Will. Conditional.

To be valid in case of death on a particular voyage; a nullity on returning therefrom. *White, J. B., E. of, 157.*

Will. Contest.

Contest on Probate. The right to apply for a revocation of will admitted to probate is the same, whether the original probate was a finding by the Judge or the verdict of a jury. *Cunningham, Mary, E. of, 214.*

Will. Distribution Delayed.

A Devise made whereby the only trust created is that of executorship, and the distribution postponed for a given period. *Marvin, C. B., E. of, 163.*

Will. Execution of Attested.

Attestation. No formal attesting clause necessary; request to witnesses to sign need not be a direct request. *Crittenden, Howard, E. of, 50.*

Attestation of. At the time of executing the will, there must be some form of request on the part of the testator, of witnesses, to enable them to properly attest the execution, though such request need not be in words. *Fusilier, John, E. of, 49.*

Attestation. The mark of an illiterate witness to a will may be attested by the co-witness, who writes the name of such illiterate witness to the will and thereafter witnesses the mark. *Derry, William R., E. of, 202.*

Signature written by another person not a witness to the will, and not in the presence of the witnesses.

HELD, that the testator should have called the attention of the witnesses to the fact that he had signed the document; and that it had been *subscribed by him*, or by his *authority*. *Taney, Patrick, E. of, 210.*

Signature by Witness incomplete. The signature of one of the witnesses was incomplete. The first name or initials having been written, the last name not definitely appearing to have been actually traced, (either with pencil or ink), and the execution of the will being imperfect, probate is denied. *Winslow, Edward, E. of, 124.*

Signature. Should be at the foot of attested will. A will other than olographic, should be subscribed at the foot. Should such signature, however, be at the bottom of any portion of the will, the will is good for all that precedes the signature. *McCullough, John, E. of, 76.*

Will. Execution of Attested.

Signature to Attested Will. A will attested by witnesses must be subscribed at the foot of the instrument to be completely effectual. Barker, Martha L., E. of, 78.

Will. Execution of Olographic.

Autograph Instrument made by Person Dying before Passage of Act. When testator dies before passage of Act authorizing an olographic will, such will is ineffectual. The law at the date of death governs. McCloud, James, E. of, 23.

Olographic, before Passage of Act. An olographic will executed before passage of Act authorizing such an instrument, by a person dying subsequently to the passage of the Act, is valid, the will being effectual as of the date of the death. Barker, Martha L., E. of, 78.

Signature to olographic will need not be subscribed at the foot of the instrument. It is otherwise as to a will attested by witnesses. Barker, Martha L., E. of, 78.

Signature need not be a subscription. Johnson, George W., E. of, 5.

Signature. "This is the last will of Philip Donoho," there being no subscription at the foot of the document, held to be effectual as a signing, it appearing that the testator intended it to be a completed instrument in that form. Donoho, Philip, E. of, 140.

Will. Future Contingent Interest.

Devise. A future contingent interest vests in beneficiary so as to be the subject of a succession. Selms, Ubaldo, E. of, 233.

Will. Inofficious.

Ab Irata. Mental incapacity. Restraint. Undue influence. Fraudulent misrepresentation. Delusion. Charge to Jury. Tittel, Frederica A., E. of, 12.

Narcotics. Mental incapacity arising from opium habit. Undue influence. Charge to Jury. Crittenden, Howard, E. of, 50.

Restraint. Unsound mind. Alcoholism. Undue influence. Misrepresentation. Habitual intemperance. Charge to Jury. Black, James, E. of, 24.

Undue Influence by wife to exclusion of son. Charge to Jury. Low, C. L., E. of, 143.

Will. Interpretation of.

Appointment of Executor. When it can be fairly ascertained who is meant by the testator, mere inaccuracies in the style given by him to the presiding officer of a secret society will be disregarded and testator's intent carried out. Colette, O. A. P., E. of, 116.

Bequest "to those of the before mentioned children who have attained the age of twenty-one years;"

HELD, to apply to those of that age at the date of the death, to the exclusion of minors. Crooks, Matthew, E. of, 247.

Will. Interpretation of.

Devise covers other estate than realty, notwithstanding its original primary signification. Pfuelb, Margaretha, E. of, 38.

Devise to a person and "the issue of her body;"

HELD, that the words do not create a fee in the first devisee, unless such is the clear intention of testator. "Issue of her body," not synonymous with the word "heirs," to bring the phrase within the rule in Shelley's Case and Norris v. Hensley, 27 Cal., 439. McDonnell, John, E. of, 94.

Devise. Precatory Words. "To wife's use and interest or those of children," with power of disposition, held that the wife takes absolutely. Glass, Julius, E. of, 213.

Devise. Precatory Language. "To my beloved wife, the whole of my property, *for her own use and benefit*, and to *maintain and support my said children with*, the same to be hers absolutely."

HELD, to vest estate absolutely in wife, and not to create a trust. Molk, John H., E. of, 212.

Will. Legacy.

Demonstrative. Where a special fund is set apart by will to pay demonstrative legacies, the Court will not endanger the means of their payment by directing the payment, out of such fund, of a legacy that may ultimately, be satisfied from another source. Radovich, Luco, E. of, 118.

Will. Mental Incapacity.

Experts. Alcoholism. Mental Incapacity arising from. Instructions to Jury. O'Keefe, E. of, 154.

Mental Incapacity arising from alcoholism, ground of refusal to probate a will.

When such mental incapacity exists, it is unnecessary to enquire whether there has been undue influence. Hannigan, Hepsabeth, E. of, 135.

See Charge to Jury.

Will. Mortgaged Property.

Devise of property subject, at death of testator, to a mortgage bearing interest.

HELD, that, under Sec. 1513, C. C. P., devisee was entitled to have mortgage paid out of the estate. Phinney, Arthur, E. of, 239.

Will. Pleading.

Opposition to Probate. Pleading. Opposition to probate of a will should disclose the facts constituting the alleged menace, undue influence, etc. Myers, Margaret M., E. of, 205; Clarke, Margaret T., E. of, 259.

Will. Practice.

Probate Practice. On a contest it is the contestant who is plaintiff and should first proceed with the trial. Collins, Thomas, E. of, 73.

Will. Pretermission.

Pretermission of Illegitimate Child. An illegitimate child inherits from her mother, if there be no mention of the child in the will, as pretermitted. Wardell, Ada, E. of, 224.

Will. Public Administrator.

Public Administrator has the right to administer, only in cases of intestacy. Where there is a will, the Court has discretion to appoint. Nunan, Jeffrey, E. of, 238.

Will. Record of.

Extraneous documents merely referred to in will, need not be made part of the probate record of the will. Myers, Margaret M., E. of, 205.

Will. Specific Devise.

Taxes and Assessments upon. Pending the administration of the estate, executor should pay taxes and assessments upon specific devises or bequests, to be re-imbursed on distribution, when, if need be, he may have order of sale of devised property to collect the amount. Mogan, A., E. of, 80.

Will. Survivorship.

Devise. Death before Distribution. Survivorship. Devise to two beneficiaries and to the survivor, in case either dies before distribution. **HELD**, that survivor takes estate to exclusion of grantee of deceased beneficiary. Cronin, John and Johanna, E. of, 252.

Will. Undue Influence.

Drafted by Beneficiary. The fact that will was drafted by beneficiary is, at most, a suspicious circumstance; but, in itself, raises no presumption of undue influence. Byrne, H. H., E. of, 1.

See Charge to Jury.

Partner. The fact that a partner is a beneficiary under a will is no evidence of any undue influence on the part of the partner. Broocka, Edmund, E. of, 141.

Will,

See Administration: Bequest: Devise: Grant of Letters: Jury: Trust.

Witness.

Discovery. Examination of a witness in Probate Court under Sec. 1459, C. O. P., to discover property of estate;

HELD, to apply only to transactions between witness and decedent in lifetime of decedent, so that administrator may, as to his knowledge in the premises, stand on equal terms with witness.

It does not apply to matters occurring after death. Imhaus, Louis, E. of, 99.

On Grant of Letters. A creditor can testify as to the fact of the indebtedness of decedent to him on hearing of application for letters. Welch, John, E. of, 202.

Wife cannot be a witness as to conversations occurring between herself and husband, no matter what the subject of such conversations may have been. Low, C. L., E. of, 143.

See Evidence.

